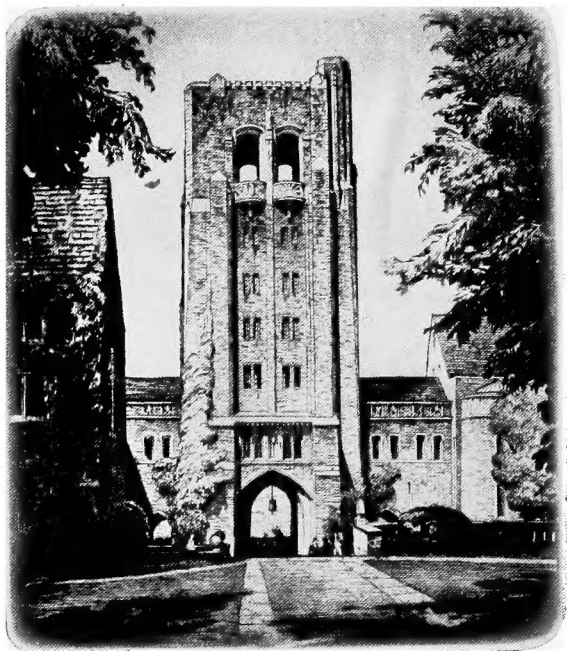


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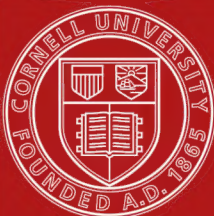
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WOOD ON RAILWAY LAW.

VOLUME III.

SECOND EDITION.

A TREATISE
ON
THE LAW OF RAILROADS.

BY
H. G. WOOD,
AUTHOR OF "THE LAW OF LIMITATIONS," "NUISANCES," ETC.

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BY H. D. MINOR,

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LAW OF RAILROADS.

CHAPTER XIX.

INJURIES BY FIRE.

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|------------------------------------------------------------------------|---------------------------------------|
| SEC. 326. General Rule as to. | SEC. 330. Negligence of the Property- |
| 327. Failure to extinguish Fire. | Owner. |
| 328. Burden of Proof. | 331. Statutory Liability. |
| 329. Combustible Materials on
Right of Way: Proof of
Negligence. | 332. Remote Fires. |

SEC. 326. **General Rule as to.** — A railway company, being authorized to use steam in the operation of its trains, is only bound to use ordinary care against fires, and is not liable for a purely accidental fire, caused by fire escaping from its engines.¹ But it is

¹ *Leavenworth, &c. R. Co. v. Cook*, 18 Kan. 261; *Missouri, &c. R. Co. v. Davidson*, 14 Kan. 349; *Kansas Pacific R. Co. v. Butts*, 7 Kan. 308; *Brown v. Atlanta, &c. R. Co.*, 19 S. C. 39; *Eddy v. Lafayette*, 49 Fed. Rep. 807; 1 C. C. A. 441; *Hill v. Ontario, &c. Ry. Co.*, 13 U. C. Q. B. 503; *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679; *Piggott v. Eastern Ry. Co.*, 3 C. B. 229; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Philadelphia, &c. R. Co. v. Yeiser*, 8 Penn. St. 366; *Phila., &c. R. Co. v. Schultz*, 37 Leg. Int. (Penn.) 386; *Frankford, &c. T. Co. v. Phila., &c. R. Co.*, 54 Penn. St. 345; *Phila., &c. R. Co. v. Hendrickson*, 80 Penn. St. 182; *Erie R. Co. v. Decker*, 78 Penn. St. 293; *White v. Chicago, &c. R. Co. (S. Dak.)*, 47 N. W. Rep. 146; *Gandy v. Chicago, &c. R. Co.*, 30 Iowa, 420; *Phila., &c. R. Co. v. Yerger*, 73 Penn. St. 121; *Chapman v. Atlantic, &c. R. Co.*, 37 Me. 92; *Louisville, &c. R. Co. v. Richardson*, 66 Ind. 43; *Chicago, &c. R. Co. v. Pennell*, 94 Ill. 448; *Toledo, &c. R. Co. v. Larmon*, 67 Ill. 68. Thus, a charge that, in the matter of keeping its right of way free and clear of combustible materials, and in providing its locomotives with suitable spark-arresters, the company was only called upon to exercise "reasonable care, skill, and diligence," states the proper rule. *Eddy v. Lafayette*, 49 Fed. Rep. 807; 1 C. C. A. 441.

In some of the States, in the absence of evidence to show that the locomotive from which fences, hay, and grass caught fire was improperly constructed, and had not an approved spark-arrester, it is held that there can be no recovery. *Jennings v. Pennsylvania R. Co.*, 93 Penn. St. 337; *Reading, &c. R. Co. v. Latshaw*, 93 Penn. St. 449. But upon the trial of an action against a railroad company for damages from a fire caused by sparks from an engine where the company gave evidence that the engine was furnished with an improved spark-arrester, and in rebuttal

bound to employ the best appliances *in known use*, in the form of fire-boxes, spark-arresters, etc., and any failure in this respect is a want of ordinary care and prudence.¹ In most of the States, if the

plaintiff testified that numerous fires had been ignited by sparks from this same engine, it was held that the question of negligence was for the jury. See also *Hoffman v. Chicago, &c. R. Co.*, 43 Minn. 334. In an action for damages sustained in having cotton burned, it is not a prejudicial error to exclude evidence that cotton similarly stored had frequently caught fire from engines, when it appears that the fire occurred between four and five o'clock in the evening, and that no locomotive has passed there later than 2.40 P. M. *Martin v. St. Louis, &c. R. Co.*, 55 Ark. 510.

The company is liable for the loss of life as well as of property caused by fires started by its engines. *Rajnowski v. Detroit, &c. R. Co.*, 78 Mich. 681. The purchasers of a railroad are not responsible for injuries done by the road *before the sale*, and instructions to the jury to consider the "value of the land then and now" are erroneous. *Hammond v. Port Royal, &c. R. Co.*, 15 S. C. 10. But a company cannot defend on the ground that it had purchased the road only a few days before the injury, and that the combustibles had accumulated during its predecessor's occupancy. *Lake Erie, &c. R. Co. v. Cruzen*, 29 Ill. App. 212. Where one train passes the scene of the injury about half an hour after a preceding one, and there is some doubt as to which of the two caused the fire, the question must be left to the jury. To a suit against a railroad company for damages caused by sparks from a locomotive, the defendant must prove that it was not negligent, and that the locomotive was properly constructed and in good condition. *Simpson v. East Tenn., &c. R. Co.*, 5 Lea (Tenn.), 456.

The use of ordinary fuel to make steam in engines is legal; the limit on its use is that the latest improvements in its management in practical use should be applied to it. It is the duty of the company to use such precaution as will reasonably prevent damages to others, and a failure to do so is negligence. A building near a railway was found to be on fire, while a

train drawn by an engine without a "spark-catcher" was passing; there was no direct evidence that sparks had come from the engine. It was held that it was proper for the court to submit the question of negligence to the jury. *Lackawanna, &c. R. Co. v. Doak*, 52 Penn. St. 379. But the use of wood in a coal-burning engine in a dry time, with a high wind prevailing, is negligence. *Chicago & Alton R. Co. v. Quaintance*, 58 Ill. 389. The fact of the use of a locomotive without a screen over the smoke-stack is sufficient evidence of negligence to go to the jury, in an action for damages caused by a fire originating from such engine. *Bedell v. Long Island R. Co.*, 44 N. Y. 367.

¹ *Burrongs v. Housatonic R. Co.*, 15 Conn. 124; *Jacksonville, &c. R. Co. v. Peninsular Land Co.*, 27 Fla. 1, 157; *Bass v. Chicago, &c. R. Co.*, 28 Ill. 9; *Illinois Central R. Co. v. McClelland*, 42 Ill. 355; *Chicago, &c. R. Co. v. Pennell*, 94 Ill. 414; *St. Louis, &c. R. Co. v. Gilham*, 39 Ill. 455; *Illinois Central R. Co. v. Mills*, 42 Ill. 407; *Toledo, &c. R. Co. v. Corn*, 71 Ill. 493; *Ohio, &c. R. Co. v. Shanefelt*, 47 Ill. 497; *Chicago, &c. R. Co. v. Quaintance*, 58 Ill. 389; *Toledo, &c. R. Co. v. McCahill*, 56 Ill. 28; *Toledo, &c. R. Co. v. Pindar*, 53 Ill. 447; *Pittsburgh, &c. R. Co. v. Nelson*, 51 Ind. 150; *Pittsburgh, &c. R. Co. v. Noel*, 77 Ind. 110; *Pittsburgh, &c. R. Co. v. Hixon*, 79 Ind. 111; *Indianapolis, &c. R. Co. v. Parnmore*, 31 Ind. 143; *Gagg v. Vetter*, 41 Ind. 228; *Toledo, &c. R. Co. v. Wand*, 48 Ind. 476; *Jackson v. Chicago, &c. R. Co.*, 31 Iowa, 176; *Kansas, &c. R. Co. v. Butts*, 7 Kan. 308; *Baltimore, &c. R. Co. v. Woodruff*, 4 Md. 242; *Hoyt v. Jeffers*, 30 Mich. 181; *Spear v. Marquette, &c. R. Co.*, 49 Mich. 246; *Fitch v. Pacific R. Co.*, 45 Mo. 322; *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580; 29 Am. & Eng. R. Cas. 117; *Longabaugh v. Virginia City, &c. R. Co.*, 9 Nev. 271; *King v. Morris, &c. R. Co.*, 19 N. J. Eq. 397; *Delaware, &c. R. Co. v. Salmon*, 39 N. J. L. 5; 20 Am. Rep. 356; *Hoff v. West Jersey R. Co.*, 45 N. J. L. 201; 13 Am. &

spark-arresters, etc., are shown to be of the *most approved pattern in use*, and in proper repair, it is a full defence to an action for fires set by the company, *unless some negligence in other respects is shown.*¹

Eng. R. Cas. 476; Cook v. Champlain Tr. Co., 1 Denio, 91; Lackawanna, &c. R. Co. v. Doak, 52 Penn. St. 379; Jennings v. Pennsylvania R. Co., 93 Penn. St. 337; Reading, &c. R. Co. v. Latshaw, 93 Penn. St. 449; Smith v. Old Colony R. Co., 10 R. I. 22; Brown v. South Carolina R. Co., 19 S. C. 39; 13 Am. & Eng. R. Cas. 479; Simpson v. East Tenn., &c. R. Co., 5 Lea (Tenn.), 456 (burden of proof is on the company to show itself free from negligence); Rost v. Missouri, &c. R. Co., 76 Tex. 168; Brighthope, &c. R. Co. v. Rogers, 76 Va. 443; Anderson v. Cape Fear Steamboat Co., 64 N. C. 399; Snyder v. Pittsburgh, &c. R. Co., 11 W. Va. 14; Spaulding v. Chicago, &c. R. Co., 30 Wis. 110; 11 Am. Rep. 550; Read v. Morse, 34 Wis. 315; Ward v. Milwaukee, &c. R. Co., 29 Wis. 144. Compare Kelsey v. Chicago, &c. R. Co. (S. Dak.), 45 N. W. Rep. 204.

¹ Bevier v. Del., &c. Canal Co., 13 Hun, 254; Chicago, &c. R. Co. v. Smith, 11 Bradw. (Ill. App.) 348; Collins v. N. Y. Central R. Co., 5 Hun, 503; Vaughan v. Taff Vale Ry. Co., 5 H. & N. 679. In Phila., &c. R. Co. v. Schultz, 93 Penn. St. 341, the court held that if reasonable precautions are taken in providing engines with those appliances which are deemed best for the prevention of damage by fire, the company using them cannot be made liable, "*though they fire every rod of the country through which they run.*"

Evidence that on the occasion of the fire, large showers of sparks were seen flying from the chimney of the locomotive, and that a few days later other property was set on fire by sparks from the same engine, authorizes the inference that the spark-arrester or other appliance was not in proper order. Louisville, &c. R. Co. v. Taylor (Ky.), 17 S. W. Rep. 198; s. p. Sugarman v. Manhattan El. R. Co., 16 N. Y. Supp. 533; Hoover v. Missouri Pac. R. Co. (Mo.), 16 S. W. Rep. 480; Knight v. Chicago, &c. R. Co., 81 Iowa, 310; Mills v. Chicago, &c. R. Co., 76 Wis. 422; Missouri Pac. R. Co. v. Texas, &c. R. Co.,

41 Fed. Rep. 917. See also in this connection Lake Erie, &c. R. Co. v. Helmerick, 29 Ill. App. 270; Jackson v. Chicago, &c. R. Co., 31 Iowa, 176; 7 Am. Rep. 120. In an Illinois case, Toledo, &c. R. Co. v. Larmon, 67 Ill. 68, the court, at the instance of the plaintiff, charged the jury that "it is the duty of the defendant to operate its engines and locomotives, and run the same so as to guard against any accident by fire, and to employ such machinery and other agencies for safety to property as might be necessary to avoid accidental destruction, whether such machinery was then in common use or not on railroads." It was held that the instruction was erroneous, as the principle it announces would make the defendant an insurer against accidents by fire. Where the evidence shows that the engines causing the fire for which damages are claimed, were equipped with the best and most approved appliances for preventing the escape of fire or sparks, were properly and prudently managed, and no negligence on the part of the railroad company is shown, there can be no recovery for damages caused by sparks therefrom setting fire to an adjacent building. Chicago, &c. R. Co. v. Smith, 11 Brad. (Ill. App.) 348; Collins v. N. Y. Central R. Co., 5 Hun (N. Y.), 503. In a leading English case, it was held that a railway company authorized by the legislature to use locomotives is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on its railway, *provided it has taken every precaution in its power and adopted every means which science can suggest to prevent injury from fire, and is not guilty of negligence in the management of the engine.* Vaughan v. Taff Vale Ry. Co., 5 H. & N. 679. But the statement in this case in reference to the adoption of every precaution in its power, "*which science can suggest,*" is, to say the least, a very loose and extraordinary expression of a rule of law; for it not only makes the company responsible if it fails to adopt such precautions as sci-

This rule does not require the company to use any appliances which have not been tested, although approved by the highest scientific authority, but requires only the use of *those which have been tested and put into general use.*¹ *Negligence* is the gist of liability, and the owner of property is held to assume all the risks from fire incident to a proper and careful use of the road.² The company has a right to use any species of fuel in its engines in common use, and is not restricted to that kind which is the least liable to throw off sparks.³ The duty imposed upon railway companies is to use reasonable precautions to prevent fire from being carried from their engines by such winds as are usual and ordinary at the season and the place, and they are only relieved from making provision against extraordinary and unusual winds.⁴ In a South Carolina case,⁵ in an action against a railway company for the negligent burning of cotton near its track, it was held that the court did not err in refusing to charge that "if the jury find from the evidence that the defendant was provided with the most approved machinery for protection against fire, and the machinery was worked by careful and competent employes, they will find for the defendant." Because an engine may be properly equipped with spark-arresters, fire-boxes, etc., and yet have other defects by which it may set fire to adjoining premises, or its operation may be negligent,⁶ the determination of an issue, as to whether the destruction of property by fire communicated by a locomotive was the result of negligence on the part of a railway company, depends upon the facts shown *as to whether or not it used such caution and diligence as the circumstances of the case demanded or*

ence *has* suggested, but makes it liable if it can be shown to the satisfaction of a jury that science *can* suggest a better precaution than that adopted by it. In this country, the rule simply requires the company to adopt the best and most approved appliances *in use*. Texas, &c. R. Co. v. Levi, 59 Tex. 674; 13 Am. & Eng. R. Cas. 464; Brown v. South Carolina R. Co., 19 S. C. 39; 13 Am. & Eng. R. Cas. 479; Longabaugh v. Virginia City R. Co., 9 Nev. 271; Pittsburgh, &c. R. Co. v. Nelson, 51 Ind. 150; Indianapolis, &c. R. Co. v. Clem, 51 Ind. 591. See last note.

¹ Cook v. Champlain Trans. Co., 1 Denio (N. Y.), 91; Hagen v. Chicago, &c. R. Co., 86 Mich. 615; Chicago, &c. R. Co. v. Hunt, 24 Ill. App. 644; Crist v.

Erie R. Co., 58 N. Y. 638; Webb v. Rome, &c. R. Co., 49 N. Y. 420; Caldwell v. New Jersey S. B. Co., 47 N. Y. 282; Bedell v. Long Island R. Co., 44 N. Y. 367; Lackawanna, &c. R. Co. v. Doak, 52 Penn. St. 379.

² Philadelphia, &c. R. Co. v. Hendrickson, 80 Penn. St. 182.

³ Collins v. N. Y. Central R. Co., 5 Hun, 499; Baltimore, &c. R. Co. v. Woodruff, 4 Md. 242; Lackawanna, &c. R. Co. v. Doak, 52 Penn. St. 379.

⁴ Palmer v. Missouri Pacific R. Co., 76 Mo. 217.

⁵ Wilson v. Atlantic, &c. R. Co., 16 S. C. 587.

⁶ Toledo, &c. R. Co. v. Wand, 48 Ind. 476.

prudent men ordinarily exercise, and not upon the usual conduct of other companies in the vicinity.¹ In the absence of evidence to show that a locomotive from which fences or grass caught fire was improperly constructed, and had not an approved spark-arrester, or other proof of negligence, it is held proper to instruct the jury to find a verdict for the defendant in an action for damages for the loss thereby occasioned; because, unless negligence is established, the consequences are *damnum absque injuria*, being the result of a lawful act lawfully performed.² It is erroneous to charge a jury that the use of an excessive amount of steam in the operation of a train constitutes negligence *per se*. Such facts are competent evidence to determine whether or not the company has failed to exercise due diligence in the operation of its train, but are not by any means conclusive.³

SEC. 327. Failure to extinguish Fire. — It has been held that the employes of a railway company do not, by reason merely of their employment, owe any duty to the proprietors of lands adjoining the company's right of way, to extinguish a fire found on the right of way; if they omit to do so, and the fire extends to adjoining property and does injury, the company is not liable, unless the fire originated through its negligence.⁴ But the justice and reasonableness of this rule admits of grave doubt. An innocent cause may become culpable when its author on perceiving the certain harmful effects it is certain to bring about fails to exert himself to avert such consequences. Thus, where a person is injured through the negligence of another, but without fault on his own part, it is his legal duty to exercise care to render the injury as light as possible, and he cannot hold his injurer responsible for consequences which he might have

¹ Grand Trunk R. Co. v. Richardson, 91 U. S. 454. Where the servants of the company, section hands, while acting in the discharge of their duties negligently set a fire on the company's right of way so that it spread to adjacent property, the company is responsible. Gould v. Northern Pac. R. Co. (Minn.), 52 N. W. Rep. 924; Louisville, &c. R. Co. v. Nitsche, 126 Ind. 229; Missouri Pac. R. Co. v. Cady, 44 Kan. 633; St. Louis, &c. R. Co. v. Yonley, 53 Ark. 503; Clum v. Milwaukee, &c. R. Co., 75 Wis. 532.

² Jennings v. Pennsylvania R. Co., 93 Penn. St. 337; Phila., &c. R. Co. v. Schultz, 93 Penn. St. 341.

³ McCormick v. Chicago, &c. R. Co., 41 Iowa, 193. A company is guilty of negligence in attempting to draw too heavy a train up grade with a single engine so that as a necessary consequence an unusual quantity of sparks is emitted. North Shore Ry. Co. v. McWillie, 17 Can. Sup. Ct. Rep. 511.

⁴ Kenney v. Hannibal, &c. R. Co., 70 Mo. 252. The company is under no obligation to keep a patrol along its track to watch for and extinguish fires. Baltimore, &c. R. Co. v. Shipley, 39 Md. 251; Indianapolis, &c. R. Co. v. Paramore, 31 Ind. 143. As to land-owner's failure to extinguish fire, see *post*, § 330.

so prevented. The better rule therefore seems to be that when the fire originates from sparks from the company's locomotives, and when first seen by the employes may possibly be suppressed, it is negligence on their part not to make an effort to extinguish it, and this negligence will render the company liable whether the origin of the fire was owing to any want of care or not.¹ The law limits a recovery for a tort to those damages which are its natural and proximate effects; and the natural effects are those which might reasonably be foreseen, those which occur in an ordinary state of things; and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency. A mere failure by third parties to extinguish a fire, started through the negligence of the defendant, is not such an agency.²

A railway company has the right to detach burning cars from the train, and run them off on a spur of a track so as to save the train and main track, unless damages to the property of others are apparent and the probable result; but if in doing so it stops them near the property of another, and it is consumed, it is liable for the injury, if by proper care, under all the circumstances, it could have been avoided.³

SEC. 328. Burden of Proof. — If premises are shown to have been set on fire by sparks from a locomotive, it is held in several States that a presumption of negligence arises, which it devolves upon the company to remove by proving that all necessary precautions were taken to avoid such mischief, — a character of evidence peculiarly within its possession.⁴ In some of the States this rule is established by

¹ *Kenney v. Hannibal, &c. R. Co.*, 63 Mo. 99; 70 Mo. 252; *Eighmen v. Rome, &c. R. Co.*, 10 N. Y. Supp. 600; *Rolke v. Chicago, &c. R. Co.*, 26 Wis. 537. It is no defence that the company's employes had no license to enter upon plaintiff's lands, a license is always created by such emergencies. *Bass v. Chicago, &c. R. Co.*, 28 Ill. 9. The plaintiff has been allowed to prove that after the fire the company employed more men to watch the track than were employed when the fire occurred. *Westfall v. Erie R. Co.*, 5 Hun (N. Y.), 375. But this rule is not accepted by the weight of authority and has no foundation in principle. See 16 Am. & Eng. Ency. Law, p. 457; *ante*, pp. 1573, 1574.

² *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

³ *St. Louis, &c. R. Co. v. Hecht*, 38 Ark. 357.

⁴ *Burke v. Louisville, &c. R. Co.*, 7 Heisk. (Tenn.) 451; *Simpson v. East Tenn., &c. R. Co.*, 5 Lea (Tenn.) 456; 6 Am. & Eng. R. Cas. 611; *Eddy v. Lafayette*, 49 Fed. Rep. 807; 1 C. C. A. 441; *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580; 29 Am. & Eng. R. Cas. 117; *Tanner v. N. Y. Central R. Co.*, 108 N. Y. 623; 32 Am. & Eng. R. Cas. 380; *Brown v. Atlanta, &c. R. Co.*, 19 S. C. 39; *Penn. Co. v. Watson*, 81½ Penn. St. 293; *Spaulding v. Chicago, &c. R. Co.*, 33 Wis. 582; *Coale v. Hannibal, &c. R. Co.*, 60 Mo. 227; *Bass v. Chicago, &c. R. Co.*, 28 Ill. 9; *Ill. Central R. Co. v. Mills*, 42 Ill. 407; *St. Louis, &c. R. Co. v. Montgomery*, 39 Ill. 335; *Woodson v. Milwan-*

statute.¹ If one or more of the engines of a railway company drops coals or emits sparks just prior to or soon after property on the line of its track has been destroyed by fire, without any other known cause or circumstance of suspicion, it is incumbent upon the company to show that its engines were not the cause of it.² The frequent setting out of fires will justify the inference of negligence.³ And while negligence will not be presumed in case of fire being set to grass and communicating to the fences adjoining,⁴ yet it may be established by circumstantial evidence,⁵ — as, by showing that the engine is in fact defective⁶ from the driving of the train at an unlawful rate of speed,⁷ or that coals and sparks had been emitted from the same engine in large quantities at other times before the fire. Thus, where the plaintiff's witnesses testify that coals and cinders of such an unusual size as to indicate negligence in the management of the engine were thrown from it, and were carried by the wind upon and under the plaintiff's barn, which was on fire a few minutes afterwards, it was held sufficient evidence to go to the jury upon the questions whether the fire was communicated from the engine to the barn, and whether the engine was properly managed, even admitting that defendant's evidence was conclusive that the engine was furnished with the most approved appliance for preventing the escape of sparks, coals, and cinders. Evidence that coals of a similar size to those testified to were seen, immediately after the

kee &c. R. Co., 21 Minn. 60; Burlington, &c. R. Co. v. Westover, 4 Neb. 268; Fitch v. Pacific R. Co., 45 Mo. 322; Case v. Northern Central R. Co., 59 Barb. (N. Y.) 644; Coates v. Missouri, &c. R. Co., 61 Mo. 38; Kinney v. Hannibal, &c. R. Co., 70 Mo. 243.

¹ Baltimore, &c. R. Co. v. Dorsey, 37 Md. 19; Annapolis, &c. R. Co. v. Gantt, 39 Md. 115; Cleveland v. Grand Trunk R. Co., 42 Vt. 449; Chicago, &c. R. Co. v. McCahill, 56 Ill. 28; Chicago, &c. R. Co. v. Clappitt, 69 Ill. 95; Small v. Chicago, &c. R. Co., 50 Iowa, 338; *post*, § 331.

² Longabaugh v. Virginia City R. Co., 9 Nev. 271.

³ Missouri Pacific R. Co. v. Kincaid, 29 Kan. 654; 11 Am & Eng. R. Cas. 83. The burden of proof to show that fire was set negligently is on the plaintiff. Babcock v. Chicago, &c. R. Co., 62 Iowa, 593; 11 Am. & Eng. R. Cas. 63; Gulf, &c.

R. Co. v. Holt (Tex.), 11 Am. & Eng. R. Cas. 72; Palmer v. Missouri Pacific R. Co., 70 Mo. 217; Phila., &c. R. Co. v. Yerger, 73 Penn. St. 121.

⁴ Toledo, &c. R. Co. v. Parker, 73 Ill. 526.

⁵ Gandy v. Chicago, &c. R. Co., 30 Iowa, 420; Atchison, &c. R. Co. v. Stanford, 12 Kan. 354; Atchison, &c. R. Co. v. Bales, 16 Kan. 652; Caswell v. Chicago, R. Co., 42 Wis. 193.

⁶ Ellis v. Portsmouth, &c. R. Co., 2 Ired. (N. C.) 138; Gandy v. Chicago, &c. R. Co., 30 Iowa, 420; McCully v. Clarke, 40 Penn. St. 399; Lackawanna, &c. R. Co. v. Doak, 52 Penn. St. 379; Gerke v. California Nav. Co., 9 Cal. 251; Piggott v. Eastern Counties Ry. Co., 3 C. B. 229; Anderson v. Cape Fear S. B. Co., 64 N. C. 399.

⁷ Martin v. Western, &c. R. Co., 23 Wis. 437. But see Brusberg v. Milwaukee, &c. R. Co., 55 Wis. 106.

engine had passed, upon the track and on the snow beside it, in the immediate vicinity of the barn, was admissible; as was also evidence showing how the fire emitted by the engine at that time compared with that emitted by engines on the road at other times,¹ or even after the fire,² that the fire started soon after the engine passed, in the grass near the track, and that there was no person and no other fire near, is sufficient to sustain a finding that the fire was set by a passing engine,³ or that wood was burned in an engine only adapted to burning coal,⁴ or that the engine was stopped for some time emit-

¹ *Brusberg v. Milwaukee, &c. R. Co.*, 55 Wis. 106. In this case the issue was whether the fire which destroyed plaintiff's barn was caused by negligence of the defendant railway company in running its engine. Defendant showed that the engine was a perfect one in all respects, and was provided with suitable appliances in every respect for preventing the escape of fire; and the persons in charge of the engine at the time testified that it was run in a careful manner, and that the spark-arrester on the smoke-pipe and the fire-box were both closed, so that no dangerous coals or sparks could escape therefrom. The testimony for plaintiff was not only that the barn was found on fire shortly after the engine passed, but that at the time of such passage the engine was emitting sparks in great numbers, and coals an inch or more in length; that such sparks and coals struck the barn, and some of them went under it; that coals of a similar size were seen immediately after on the track, and on the snow beside the track, in the immediate vicinity of the barn; and that several stumps a short distance from the barn, and near the track were also found to be on fire a short time after. Officers of the railway company also testified that if the engine had been properly run and cared for, no coals of the size described could have escaped. It was held that the court did not err in refusing a non-suit, and submitting to the jury the questions whether the fire was communicated to the barn from the engine, and whether the latter was negligently managed. *Spaulding v. Railway Co.*, 30 Wis. 110, and 33 Wis. 582, and *Read v. Morse*, 34 Wis. 315, distinguished. The evidence as to the burning of the stumps adjoining

the track as above stated was properly admitted against defendant's objection; as was also testimony showing how the fire emitted by the engine on the occasion in question compared with that emitted by engines on the road at other times. See *Railroad Co. v. Funk*, 85 Ill. 460; *Railroad Co. v. Campbell*, 86 Ill. 443; *Garrett v. Chicago, &c. R. Co.*, 36 Iowa, 121; *Gagg v. Vetter*, 41 Ind. 228; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 215; *Field v. N. Y. Central R. Co.*, 32 N. Y. 339; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Philadelphia, &c. R. Co. v. Schultz*, 93 Penn. St. 341; 2 Am. & Eng. R. Cas. 271; *Piggott v. Eastern Counties Ry. Co.*, 3 C. B. 229; 54 E. C. L. 228; *Henry v. Southern Pacific R. Co.*, 50 Cal. 176; *Crist v. Erie R. Co.*, 58 N. Y. 638; *House Ins. Co. v. Penn. R. Co.*, 11 Hun (N. Y.), 182; *Penn. R. Co. v. Stranahan*, 79 Penn. St. 405.

² *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Field v. N. Y. Central R. Co.*, 32 N. Y. 339; *Westfall v. Erie R. Co.*, 5 Hun (N. Y.), 75; *Burke v. Louisville, &c. R. Co.*, 7 Heisk. (Tenn.) 451; *Ross v. Boston, &c. R. Co.*, 6 Allen (Mass.), 87; *St. Joseph, &c. R. Co. v. Chase*, 11 Kan. 47; *Atchison, &c. R. Co. v. Stanford*, 12 Kan. 354; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Hujett v. Phila., &c. R. Co.*, 23 Penn. St. 373; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449. But, *contra*, see *Lester v. Kansas, &c. R. Co.*, 60 Mo. 265; *Phila., &c. R. Co. v. Geiser*, 8 Penn. St. 366; *Smith v. Old Colony R. Co.*, 10 R. I. 22.

³ *Karsen v. Milwaukee, &c. R. Co.*, 29 Minn. 12; *Woodson v. Milwaukee, &c. R. Co.*, 21 Minn. 60.

⁴ *Chicago, &c. R. Co. v. Quaintance*,

ting sparks in large quantities at the point where the fire broke out,¹ that the engine emitted sparks of an unusual size and in unusual quantities at the time;² and it is not necessary to show that this was the case in the vicinity where the fire started, but it may be shown to have occurred at a distance therefrom.³ The mere fact that a fire is occasioned by sparks emitted from the smokestacks of engines does not, of itself, establish negligence, nor would it be sufficient to authorize a jury to infer negligence, unless the emission of the sparks was unusual in degree or character, or the sparks were of an extraordinary size, and such as would not be emitted from perfectly constructed locomotives.⁴

SEC. 329. Combustible Material on the Right of Way: Proof of Negligence. — It is not negligence, *per se*, for a railway company to permit dry grass and herbage to remain on its right of way, but the fact is one for the jury from which negligence may be inferred.⁵ But where a railway company suffered a heavy growth of dry grass to remain on its right of way through plaintiff's premises, and fire was communicated from the locomotive of a freight train, while laboring to ascend a heavy grade, to the grass and weeds in the right of way, and from thence communicated to the fences and grass of plaintiff, which were destroyed, it was held that the company was guilty of negligence, and that the plaintiff was entitled to recover.⁶ Indeed,

¹ Ill. 389; *St. Joseph, &c. R. Co. v. Chase*, 11 Kan. 47.

² *Fero v. Buffalo, &c. R. Co.*, 22 N. Y. 209.

³ *Gt. Western R. Co. v. Haworth*, 39 Ill. 347; *Jackson v. Chicago, &c. R. Co.*, 31 Iowa, 176; *Henry v. Southern Pacific R. Co.*, 50 Cal. 176; *Caswell v. Chicago, &c. R. Co.*, 42 Wis. 193; *Toledo, &c. R. Co. v. Maxfield*, 72 Ill. 95.

⁴ *Pennsylvania R. Co. v. Stranahan*, 79 Penn. St. 405.

⁵ *McCaig v. Erie R. Co.*, 8 Hun (N. Y.), 599. See the rule as to such cases, *ante*, p. 1344, note 2.

⁶ *Burlington, &c. R. Co. v. Westover*, 4 Neb. 268; *Cantlon v. Eastern R. Co.*, 45 Minn. 481; *Eddy v. Lafayette*, 49 Fed. Rep. 807; 1 C. C. A. 441; *St. Louis &c. R. Co. v. Richardson*, 47 Kan. 517; *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308; *Louisville, &c. R. Co. v. Stevens*, 87 Ind. 198; *Perry v. Southern Pacific R. Co.*, 50 Cal. 578.

⁶ *Rockford, &c. R. Co. v. Rogers*, 62 Ill. 346; *Salmon v. Delaware, &c. R. Co.*, 38 N. J. L. 5; *Delaware, &c. R. Co. v. Salmon*, 39 N. J. L. 299; *Longabaugh v. Virginia City, &c. R. Co.*, 9 Nev. 271. "A railway company may be supplied with the best engines and most approved apparatus for preventing the emission of sparks, and may be operated by skilful engineers. It may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent owners. Conceding that a railroad company is relieved from all responsibility for fires unavoidably caused by its locomotives, it does not follow that it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the track is

negligence, in this respect, may be established by circumstances, bearing more or less directly on the case, which might not be satisfactory in other cases free from such difficulty and open to clearer proofs,¹ even wholly by circumstantial evidence; and it is not necessary in such a case that any direct proof of any particular act of negligence should be introduced.²

In some of the States the duty to keep the right of way free from combustible materials is imposed by statute.³ But independently of such provisions it seems that a railroad company is guilty of a want of ordinary care in allowing such material to accumulate along and upon its right of way. The danger from its presence is obvious, and is preventable by the exercise of a slight degree of diligence, and the weight of authority is strongly in favor of considering a failure to remove it sufficient evidence of a want of care to make the company responsible in the absence of extenuating circumstances.⁴

quite as much a means of preventing fires to adjoining lands as the employment of the most improved and best constructed machinery. Many of the authorities hold that the accumulation of such matter is *per se* negligence which will render the company responsible if loss ensues. Others hold, and with perhaps better reason, that it is a question for the jury to determine upon all the circumstances of the case. And this was the view taken by this court in *Brighthope R. Co. v. Rogers*, 76 Va. 443; 8 Am. & Eng. R. Cas. 710." *Richmond, &c. R. Co. v. Medley*, 75 Va. 449; 7 Am. & Eng. R. Cas. 495.

¹ *Garrett v. Chicago, &c. R. Co.*, 36 Iowa, 121.

² *Atchison, &c. R. Co. v. Bales*, 16 Kan. 252; *Philadelphia, &c. R. Co. v. Hendrickson*, 80 Penn. St. 182.

³ There is no question as to the constitutionality of such statutes. *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580; 29 Am. & Eng. R. Cas. 117. In order to warrant a recovery under such a statute it must be shown that there was a sufficient amount of combustible material along the track to indicate to a man of common prudence a danger from fire, and it is error to refuse so to charge the jury. *Spencer v. Montana Central R. Co. (Mont.)*, 27 Pac. Rep. 681.

⁴ *Chicago, &c. R. Co. v. Goyette*, 32 Ill.

App. 574; *affirmed*, 133 Ill. 21; *Billings v. Fitchburg R. Co.*, 11 N. Y. Supp. 837; *Moore v. Chicago, &c. R. Co.*, 78 Wis. 120; *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252; 46 N. W. Rep. 972; *Martin v. New York, &c. R. Co.*, 62 Hun (N. Y.), 181, *Indiana, &c. R. Co. v. Oberman*, 110 Ind. 538; 29 Am. & Eng. R. Cas. 161; *Gibbon v. Wisconsin, &c. R. Co.*, 66 Wis. 161; 25 Am. & Eng. R. Cas. 479; *Sibirud v. Minneapolis, &c. R. Co.*, 29 Minn. 58. The case of *Ohio, &c. R. Co. v. Shamfelt*, 47 Ill. 497, holds that it is as much the duty of the adjacent land-owner to keep his land near the track free from dry grass and weeds as it is the duty of the company to keep its right of way free from such materials. But this case cannot be considered as stating the present doctrine. The better view is that laid down by Judge MAXWELL, of the Nebraska Court, in his article in volume 8 of the *Am. & Eng. Ency. Law*, p. 14, that "The general rule is that a railway company must keep its track and right of way clear of all such substances as are liable to be ignited by sparks or cinders from its engines. This is a duty clearly implied in the grant or charter which confers the right to use steam-engines. As fire is a dangerous agent, it is but reasonable to presume that the legislature in making the grant annexed the implied condition that the

The true rule may be said to be that it is for the jury to say, *in the light of all the evidence and circumstances, including the surroundings and dryness of the time*, whether or not the railway company has permitted such an accumulation of combustible matter within its right of way, exposed to fire, as would be permitted by a careful, prudent man upon his own premises, exposed to the same hazards.¹ Thus, a complaint against a railway company, alleging that the plaintiff contracted with the defendant to deliver wood on the defendant's track, and did deliver one hundred and twenty-five cords, of the value, etc., that the defendant cut down grass and weeds on its track and grounds, which, with other inflammable material, it negligently permitted to accumulate at the place until very dry, when they were set on fire by the passing engines, negligently operated on the road by the defendant, by reason of which the wood was consumed, does not sufficiently show that the injury was the result of the defendant's negligence, and is bad on demurrer.² But where the proof showed that, although the defendant had the proper mechanical appliances to prevent the escape of fire, yet there was a heavy

track and right of way should be kept in such condition as to avoid danger from fire spreading therefrom." See *Smith v. London, &c. Ry. Co.*, L. R. 5 C. P. 98; *Jones v. Michigan Central R. Co.*, 59 Mich. 437; 25 Am. & Eng. R. Cas. 482; *Kellogg v. Chicago, &c. R. Co.*, 26 Wis. 223.

¹ *Snyder v. Pittsburgh, &c. R. Co.*, 11 W. Va. 14; *Richmond, &c. R. Co. v. Medley*, 75 Va. 499; 7 Am. & Eng. R. Cas. 495; *Cantlon v. Eastern R. Co.*, 45 Minn. 481; *Eddy v. Lafayette*, 49 Fed. Rep. 807; 1 C. C. A. 441; *St. Louis, &c. R. Co. v. Richardson*, 47 Kan. 577; *Keese v. Chicago, &c. R. Co.*, 30 Iowa, 78; *Ohio, &c. R. Co. v. Sharnfelt*, 47 Ill. 497; *White v. Missouri Pac. R. Co.*, 31 Kan. 280; *Smith v. London, &c. R. Co.*, L. R. 5 C. P. 98. At a time of continued and extreme drought, while a strong wind was blowing from the land of the defendant towards the adjoining woodland of the plaintiff, coals were negligently dropped from one of the defendant's engines, which set fire to a tie; the fire was communicated to an accumulation of weeds and grass and rubbish which defendant had suffered to gather by the side of its track; thence it spread to the fence, and on

plaintiff's woodland, burning and destroying his forest-trees, etc. It was held that these facts were sufficient to sustain a verdict in favor of the plaintiff for damages. *Webb v. Rome, &c. R. Co.*, 49 N. Y. 420.

² *Pennsylvania Co. v. Gallentine*, 77 Ind. 322. In the case of *Troxler v. Richmond, &c. R. Co.*, 74 N. C. 377, it is held that it is negligence in a railway company to place near its track, and suffer to remain there, a pile of old, dry, combustible sills, or other combustible materials, which, being set on fire by one of the company's locomotives, may communicate fire to the premises of an adjoining land-owner. A complaint against a railroad, alleging that a locomotive set fire to dry rubbish "negligently suffered to gather on the defendant's right of way," "by the medium" of which crops on adjoining land of plaintiff were destroyed, was held insufficient *without alleging that the fire was suffered to escape on to plaintiff's land by the negligence of the defendant*. The mere fact that plaintiff had rubbish on his own land is not such contributory negligence as would defeat his action. *Pittsburgh, &c. R. Co. v. Hixon*, 79 Ind. 111. See also *Pittsburgh, &c. R. Co. v. Noel*, 77 Ind. 110.

growth of grass and weeds upon its land where the fire started; that it had not been burned off that season; that the plaintiff was not negligent in this respect, and the fire occurred in the latter part of September, when the weeds and grass were very dry and combustible, it was held that the jury were warranted in finding the company guilty of negligence.¹ From the mere fact that a railroad runs through a prairie country, with wild grass growing upon its right of way and adjacent thereto, it cannot be said, as a matter of law, that it is or is not incumbent upon the company to cut or destroy the wild grass upon its right of way and outside its road-bed, but the question is for the jury in view of the circumstances.² But negligence may be inferred where, cord-wood or other combustible materials are within the right of way of a railway company, and it permits such an accumulation of dry grass, weeds, and other inflammable matter within its right of way, exposed to fire from its engines, communicable to such materials, as would not be permitted by a prudent and cautious man upon his own premises exposed to the same hazard.³ And generally, if a railway company permits dry grass to remain standing between the railway track and the fence, in such quantities as to show negligence, evidence of the fact, in an action to recover damages for the destruction of a crop by fire in an adjoining field, caused by sparks from a locomotive, is admissible.⁴

If at the time the fire occurred the engine was properly constructed

¹ *Illinois Central R. Co. v. Frazier*, 64 Ill. 28.

² *Sibilrud v. Minneapolis, &c. R. Co.*, 29 Minn. 58.

³ *Pittsburgh, &c. R. Co. v. Nelson*, 51 Ind. 150.

⁴ *Henry v. Southern Pacific R. Co.*, 50 Cal. 176. In a New York case, the plaintiff's evidence tended to show that defendant erected a small house for a switchman nearly opposite the centre of the plaintiff's ice-house, which latter was a long wooden building near to defendant's road; a wood-stove was placed in the switch-house, the pipe from which went straight up through the roof, and was about fifteen feet distant from the ice-house; sparks of considerable size were emitted from the pipe before and after the fire. On the day of the fire a strong wind was blowing from the direction of the switch-house towards the ice-house; the latter took fire just opposite the switch-

house; and while the fire was in progress, sparks were seen flying from the stove-pipe to the burning building at the spot where the fire first caught; this was the first windy day after the erection of the switch-house. On the part of defendant, evidence was given to the effect that engines burning wood were constantly passing on its track about eighteen feet distant from the ice-house, but they had so passed for five years without doing injury. It was held that the evidence was sufficient to authorize a finding that the fire took from sparks from the switch-house, and that the defendant was negligent in the use of the stove. *Briggs v. New York Central R. Co.*, 72 N. Y. 26. The plaintiff's rick of beans was erected about eleven yards from the rails of the defendant's road; the engines were such as are usually employed on railways, and when they set fire to the rick were used in the ordinary manner and for the purposes

and in good order, that is sufficient, whether it was originally so constructed or not.¹ In an action against a railroad company for

authorized by statute. It was held that it was for the jury to say, on these facts, whether defendant was guilty of negligence. A non-suit should not be granted. *Aldridge v. Great Western Ry. Co.*, 3 M. & G. 514. To disprove the *prima facie* case of negligence made by the plaintiff, it was not enough for the defendant to show that the engine was of approved construction and in good condition, and was operated by a skilful engineer and fireman in the customary manner, without showing that the "customary" manner was also a careful manner. *Woodson v. Milwaukee, &c. R. Co.*, 21 Minn. 60. Evidence to show the employment of more men by the defendant after the fire than before — the necessity of having some men walk the track being conceded — is properly allowed to go to the jury upon the question whether too few or incompetent men had not been previously employed. In such a case proof of dropping coals and scattering sparks is not confined to the occasion when the injury was done, nor to defects in a single engine of the company. *Westfall v. Erie R. Co.*, 5 Hun (N. Y.), 75. Where the question in what part of a building a fire commenced is material, it is error to permit a witness who had not seen its commencement, to state "in what part of the building, judging from its appearance when he first saw it, and from all the circumstances, the fire originated." *Wood v. Chicago, &c. R. Co.*, 40 Wis. 582. Evidence of the emission of sparks from the engine at other times than the time of the injury in question is competent. *Crist v. Erie R. Co.*, 58 N. Y. 638; *Home Ins. Co. v. Penn. R. Co.*, 11 Hun (N. Y.), 182; *Nashville, &c. R. Co. v. Tyne*, 7 Am. & Eng. R. Cas. (Tenn.) 515; *Philadelphia, &c. R. Co. v. Schultz*, 93 Penn. St. 341; *Henry v. Southern Pacific R. Co.*, 50 Cal. 176. Where a person sues a railroad company for negligently permitting sparks to escape from its engines and thereby setting fire to the plaintiff's property, and where it is claimed in the action that the defendant's

engines are not in proper condition to prevent the escape of sparks, it is not error for the court to permit the plaintiff to introduce evidence on the trial tending to show that other fires were caused by sparks escaping from the defendant's engines immediately before or immediately after the time that this particular fire occurred. Such evidence would clearly tend to prove that defendant's engines were not in proper condition for arresting sparks, — either that they were not properly constructed, or that they were out of repair. *St. Joseph, &c. R. Co. v. Chase*, 11 Kan. 47; *Annapolis, &c. R. Co. v. Gantt*, 39 Md. 115; *Longabaugh v. Virginia City, &c. R. Co.*, 9 Nev. 271. Thus, in an action for loss by fire, evidence was offered by the plaintiff to show that, at various times during the same summer before the fire in question occurred, the defendant's locomotives scattered fire when going past the buildings, without showing that either of those which he claimed communicated the fire in question was among the number, or was similar to them in its make, state of repair, or management. It was held that the evidence was admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and to show a negligent habit of the officers and agents of the corporation. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. It has been held that in an action for negligently setting a fire by coals dropped or sparks emitted from a locomotive, a witness may be allowed to testify that a few weeks after the fire complained of, another fire was caused on the same road by coals dropped from another engine of the same company. *Longabaugh v. Virginia City, &c. R. Co.*, 9 Nev. 271. In a Massachusetts case, at the trial of an action against a railway company for the destruction of the plaintiff's property by fire, the defendant introduced evidence that the engine was furnished with the ordinary appliances of a cone and netting for arresting sparks, which netting was examined on the following day and found

¹ *Chicago &c. R. Co. v. Boller*, 7 Brad. (Ill. App.) 625.

setting fire by its locomotive to the plaintiff's woodyard, the court charged the jury that if they believed that a locomotive, if properly constructed, and skilfully managed, would not set fire to wood piled on the side of the track; and if they further believed that the plaintiff's wood was destroyed by fire or sparks from defendant's engine, without the plaintiff's fault, they should find for the plaintiff; and it was held correct.¹ In some States, it is held that where damage is caused by the escape of fire from a railway-engine, the burden is upon the company to show that their engine was properly constructed, equipped, and operated; and that the question of the sufficiency of such construction and equipment is one of fact for the jury.² Thus,

to be whole and in good condition; and that the engine was in the same condition as on the previous day. It was held that it was competent for the plaintiff to show in rebuttal that the engine on the day of the examination emitted sparks which set fire to property in the same neighborhood. *Loring v. Worcester, &c. R. Co.*, 131 Mass. 469. But testimony offered to prove the insufficiency of the engine or the negligence of the engineer, by showing that fire had escaped from *other* locomotives of a similar pattern is rejected as collateral and incompetent. *Coale v. Hannibal, &c. R. Co.*, 60 Mo. 227; *Lester v. Kansas City, &c. R. Co.*, 60 Mo. 265. In a Pennsylvania case, it appeared that the plaintiff's loss, if it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines; and evidence was held inadmissible on the part of the plaintiff, in order to prove the defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. *Albert v. Northern Central R. Co.*, 98 Penn. St. 316. In a Rhode Island case, in an action for burning the plaintiff's property by sparks from a locomotive, evidence that fires on the line of the road had originated from such sparks, before the occurrence of the one in question, was held admissible, to enable the jury to judge whether the defendant, in view of the previous occurrence of such fires, exercised reasonable care at the time the one in question happened; but evidence of fires

occurring subsequently to the one in question is inadmissible, unless the possibility of communicating fire by sparks from a locomotive is disputed by the defendant, in which case it is admissible solely for the purpose of proving such a possibility. *Smith v. Old Colony, &c. R. Co.*, 10 R. I. 22. In an action against a railway company for burning a barn by sparks from its engine, there was evidence that the fire commenced at or near the track, and that engines had passed shortly before the barn was fired, raising the presumption that it was fired by sparks from an engine, the particular one not being known. It was held that evidence by a witness nineteen miles away from the barn, that it was a common occurrence for engines about where he lived to set fires for rods from the track, was admissible. *Penn. R. Co. v. Stranahan*, 79 Penn. St. 409.

¹ *Longabaugh v. Virginia City, &c. R. Co.*, 9 Nev. 271.

² *Burlington, &c. R. Co. v. Westover*, 4 Neb. 268. In an action to recover for a building alleged to have been set on fire by sparks from one of the defendant's engines, which passed shortly before the fire was discovered, and is claimed to have been carelessly managed and unskilfully constructed, evidence that engines of the company passing near that place on other occasions emitted sparks and coals, which fell further from the track than the building in question, is competent. *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, *reversing* 29 Barb. (N. Y.) 226. Upon the question whether fire was communicated to a building by sparks or coals from particular

in an action for injury by fire alleged to have been caused by a locomotive, it was proved on the part of the plaintiff that the fire broke out shortly after the passing of the defendant's engine, and that that engine had none of the appliances which had been long in use to prevent sparks or hot cinders issuing from the chimney or the fire-box, and that there was no other way of accounting for the fire than by assuming it to have been caused by a spark or cinder from the engine. For the defendant, the evidence of several scientific witnesses was to the effect that the engine in question was so constructed that it was unnecessary to provide any of the safeguards suggested by the plaintiff's witnesses, and that it was impossible that sparks or cinders could have been thrown out by it so as to cause the damage complained of. In his summing up, the court, after a careful recapitulation of the evidence on both sides, left it to the jury to say whether or not there had been negligence on the part of the company either in using an improperly constructed engine or in improperly using an engine of the description mentioned by the defendant's witnesses; and the charge was held correct.¹

In a suit for injuries to the plaintiff's woodland, by fires communicated from engines on the defendant's line, there was testimony to show that one of the fires was caused by the fireman or engineer throwing from the engine a burning stick, which fell into dry grass and leaves near the track, and that it was not unusual for the defendant's firemen to throw off sticks of wood which had been tried and found too large to enter the furnace-door, and to which fire might adhere. It was held that the act was one within the scope of the

engines upon a specified occasion, evidence that sparks, and even coals, were emitted from other engines running on the same road upon other occasions, is incompetent, unless it be conceded that those other engines were of the same construction, used in the same manner, and in the same state of repair. *Boyce v. Cheshire R. Co.*, 42 N. H. 97. A party is not answerable for the reasonable exercise of a right. He is liable for negligence, unskilfulness, or malice. The firing of woods several times by sparks from the engine of a company is not in itself evidence from which negligence in managing the fires can be inferred. *Railroad Co. v. Yeiser*, 8 Penn. St. 366. Proof of the fact that the engine threw out an unusual quantity of fire was

held sufficient to overcome any direct evidence given that it was in good order, or if in good order, that it was skilfully managed by the engineer. *Chicago, &c. R. Co. v. McCabill*, 56 Ill. 28. In an action on the Massachusetts statute, for injury to the plaintiff's buildings by fire communicated by the locomotive-engine of a railway company, the introduction by the plaintiff of evidence of the direction of the wind at a place five miles distant from the fire does not afford the defendant good ground of exception, unless it appears to have misled the jury as to its direction at the time and place of the fire. *Pierce v. Worcester, &c. R. Co.*, 105 Mass. 199.

¹ *Freemantle v. London & Northwestern Ry. Co.*, 10 C. B. N. s. 89.

servant's employment, and if it was a negligent one, the defendant was liable for the consequences.¹ In Missouri, it is held that if the employes of the railway company could readily have prevented the fire from escaping from the roadway upon the plaintiff's meadow, they were guilty of gross negligence, for which the company would be responsible, notwithstanding that the locomotive was provided with the most approved safeguards against the escape of fire, and that the engineer in charge of the locomotive was competent and careful.² In a Pennsylvania case, the building of the plaintiff was about ninety feet from a railway, and was used for the storage of coal and straw. Some straw scattered about the building caught fire from sparks from a passing engine, and the fire thus ignited was carried by a high wind to the storehouse, which was destroyed. It was held that it was properly left to the jury to determine whether the negligence of the company, in allowing the escape of large sparks from the engine, was the remote or proximate cause of the injury.³

¹ Spaulding v. Chicago, &c. R. Co., 33 Wis. 582.

² Kenney v. Hannibal, &c. R. Co., 63 Mo. 99.

³ Pennsylvania R. Co. v. Lacey, 89 Penn. St. 458. A railway company authorized to use locomotives is not responsible for damages occasioned by sparks emitted from an engine travelling on its road, provided it is not guilty of negligence, and has taken due precaution to prevent injury from fire. Morris & Essex R. Co. v. State, 36 N. J. L. 553. The emission of sparks from an engine is not in itself illegal, and the loss of property adjacent to the road from the sparks, apart from misuse, is *damnum absque injuria*. It is the duty of railroad companies, running their engines close to buildings, to use the utmost vigilance and foresight to avoid injury. Every known safeguard should be adopted, and every approved invention from time to time should be used, to lessen the danger. The best precautions in use should be adopted. It was held not to be error to charge that "if the defendants used ordinary skill in procuring a good and safe spark-catcher, such as are most in use in the country, and approved by experienced railroad operators and mechanics, they would not be required to use any

other or greater care or skill in respect to the spark-catcher used by them." The evidence of the practice and common use of a stack by many others in the same business, is admissible on the question of the safety of the stack. The duty of the company was performed, if the construction of the stack was that which was best adapted to the purposes in known practical use. Frankford, &c. Turnpike Co. v. Philadelphia, &c. R. Co., 54 Penn. St. 345. Running an engine through a village where wooden buildings are so near the track as to be exposed to fire from the sparks, requires a higher degree of care than when running in the open country. Under such circumstances, and after the law had been stated in effect as above, an instruction to the jury that the plaintiff could not recover if the engine was in good order, of proper construction, and used with ordinary care, was properly refused. When the exposure of the buildings is increased by reason of a wind blowing towards them from the engine, which is standing at rest upon the track, the corporation is responsible for the utmost vigilance and care. Fero v. Buffalo, &c. R. Co., 22 N. Y. 209. By *reasonable care and diligence* is meant, having engines properly constructed, in good order, with

In an Illinois case, in an action for the burning of a barn caused by sparks from the defendant's engine, the jury were instructed that

suitable fixtures for preventing injuries by fire; the spark-catchers such as are known to the company to have been used and approved of, and best calculated to prevent the emission of sparks, while allowing sufficient draught to create steam enough to propel the engine at proper speed; and such care and diligence in using the locomotive upon the road, as would be exercised by skilful, prudent, and discreet persons, having control of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road. *Baltimore, &c. R. Co. v. Woodruff*, 4 Md. 242. A railway company is responsible for fires caused by the careless emission of sparks in the running of its engines. *Huyett v. Philadelphia, &c. R. Co.*, 23 Penn. St. 373. And for fires caused by the negligent construction or management of their engines. *Spaulding v. Chicago, &c. R. Co.*, 30 Wis. 110. Or for damages resulting from fire communicated from cinders emitted from an engine operated on its road, in consequence of the negligence of its servants, or a defect in the engine, or want of the best contrivances in use for the prevention of the spread of fire. *Jackson v. Chicago, &c. R. Co.*, 31 Iowa, 176; *Kansas Pacific R. Co. v. Butts*, 7 Kau. 308; *St. Louis, &c. R. Co. v. Gilham*, 39 Ill. 455; *Rood v. New York, &c. R. Co.*, 18 Barb. (N. Y.) 80. An engine which throws sparks into a meadow one hundred feet from the track is not provided with proper appliances for arresting its sparks. *Illinois Central R. Co. v. McClelland*, 42 Ill. 355. If it is relied upon by the company as a ground of defence that no burning sparks could reach so far as to set fire to the property, evidence is competent to show that the same engine, using similar fuel, has emitted burning sparks which have fallen at as great a distance; and if evidence has been introduced in defence to show that other similar engines upon other roads did not emit sparks that would set fire to buildings, evidence is competent in reply to show that such engines upon one of said roads have emitted sparks which set fire to objects. *Ross v. Boston, &c. R. Co.*, 6

Allen (Mass.), 87. The jury may infer negligence from the fact that fire has been scattered along by an engine, where there is no other explanation of the cause. To rebut that inference, the railway company should show the use of the best machinery and contrivances to prevent fire in that particular case, and that competent servants were employed. *Fitch v. Pacific R. Co.*, 45 Mo. 322. The fact that fire was communicated from the defendant's engine to the plaintiff's grain, with proof that this result was not probable, from the ordinary working of the engine, is *prima facie* proof of negligence sufficient to go to the jury. In such case, the finding of the jury will not be reviewed. *Hull v. Sacramento Valley R. Co.*, 14 Cal. 388. Where a house was set on fire by sparks from an engine on a dry and windy day, and it appears from the evidence that sparks flew to a great distance from defendant's engines and also set fire to several fields and fences near the same time and place, it was for the jury to say whether this was sufficient evidence of carelessness. *Huyett v. Phila., &c. R. Co.*, 23 Penn. St. 373.

If it appears that there was employed a greater amount of steam than was necessary on the engine, by reason of which an undue quantity of sparks was emitted, that will constitute negligence on the part of the company, if such unnecessary employment of the steam caused the destruction of property. *Great Western R. Co. v. Haworth*, 39 Ill. 346. Witnesses who were a quarter of a mile away from a railroad-track at the time a train passed, about fifteen minutes afterwards observed fire, and going to the place, found it was burning on the right of way, and also in the plaintiff's field about fifteen yards west of the right of way. The wind was blowing from the east, and the right of way was covered with very dry grass and weeds. There was no fire on the east side of the track, and none had been observed before the passage of the train. It was held that this was evidence enough to submit to the jury on the question whether the fire escaped from the locomotive that drew the train. *Redmond v. Chicago, &c. R. Co.*, 76 Mo. 550. In a

if the engine was properly constructed and supplied with all known and usual means for preventing the escaping sparks, the defendant

Kansas case, it appeared that the engine in passing a distance of a few miles with an ordinary load, set the adjacent grass and stubble on fire several times; that though this engine had been backward and forward over the same road during all of that fall, and though other engines were passing and repassing, some upon the same day, yet no fires had been communicated other than these upon this day from this engine: that engines in good order, and carefully managed, seldom communicated fire to the adjacent grass and stubble; and where it appeared that something was seen to be thrown out of the smoke-stack, and fall into the neighboring stubble, and almost immediately the stubble was in a blaze, and thereafter a piece of coal was found surrounded by ashes in the stubble, and apparently the remnant of a piece of coal six inches in diameter, which had been there burning; and where the conductor of the train, at the first station after passing these fires, telegraphed to the assistant superintendent of the road, "that the engine was setting the country on fire;" and where it appeared from the testimony of experts that where an engine starts a succession of fires, and others operated along the same road under similar circumstances of wind and weather do not start any, the difference can be reasonably accounted for only upon the supposition of defects in the construction, condition, or management of the engine doing the damage,—it was held that a verdict finding negligence would be sustained, although several competent witnesses who examined the engine at and shortly after the fire testified, that it was in perfect order, and supplied with the best appliances for preventing the escape of fire, and that the engineer was competent and careful, and he testified that he used all possible care and precautions to prevent the escape of sparks and fire upon that day; and although there was no direct testimony contradicting these witnesses, and that it was impossible for any one from the testimony to point out in what respect, if at all, the engine was defective, or out of order, or the engineer guilty of negligence. *Atchison, &c. R. Co. v.*

Campbell, 16 Kan. 200; *Kenney v. Hannibal, &c. R. Co.*, 70 Mo. 243. Where the issue was, whether the fire which destroyed plaintiff's barn was caused by negligence of the defendant in running its engine, the defendant showed that the engine was a perfect one in all respects, and was provided with all suitable appliances for preventing the escape of fire; and the persons in charge of the engine at the time testified that it was run in a careful manner, and that the spark-arresters on the smoke-pipe, and in the fire-box, were both closed, so that no dangerous coals or sparks could escape therefrom. The testimony for the plaintiff was not only that the barn was found on fire shortly after the engine passed, but that, at the time of such passage, the engine was emitting sparks, in great numbers, and coals an inch or more in length; that some of these struck the barn, and some went under it; that coals of a similar size were seen immediately after on the track and on the snow beside the track, in the immediate vicinity of the barn; and that several stumps, a short distance from the barn and near the track, were also found to be on fire a short time after. Officers of the company also testified that, if the engine had been properly run and cared for, no coals of the size described could have escaped. It was held that the court did not err in refusing a non-suit. *Brusberg v. Milwaukee, &c. R. Co.*, 55 Wis. 106. The plaintiff is not required to prove which one of the defendant's engines set the fire complained of. *Bevier v. Delaware, &c. Canal Co.*, 13 Hun (N. Y.), 254. In an action against a railway company for negligence in setting a fire to cord-wood, it was held that the fact of a fire having occurred in the woodyard previous to the building of the railway was entirely irrelevant. *Longabaugh v. Virginia City, &c. R. Co.*, 9 Nev. 271. For damages done to the land itself, as well as those affecting crops, fences, etc., by fire caused by negligence, the person who was in the actual possession and occupancy of the land may recover without proof of paper title, unless the defendant show an outstanding adverse title to the land higher

was not liable unless the fire was caused by the negligent and unskilful *management* of the engine by the defendant's agents, and they were required to find specially whether the defendant was guilty of negligence which caused the loss, and, if so, in what such negligence consisted. The jury, answering the first question affirmatively, found that the negligence consisted in "not using proper precaution in handling the engine to prevent the extraordinary escape of sparks in passing the barn;" and the finding was held to be sufficiently specific.¹

While evidence of a single fire may not be sufficient to warrant a finding of negligence, yet when it appears that at or about the same time several fires are caused by the same engine, and that only at or about that time were any fires caused by such engine, although used continuously for months, and also that an engine in good order and properly managed does not ordinarily cause fires, it was held that a jury is justified in finding negligence; and this notwithstanding it is unable to point out specifically wherein the negligence consists.² It is competent to show the manner in which the defendant's engines emitted fire shortly after the fire in question,³ and it is not necessary that the proof should show from which engine the fire escaped. Thus, the evidence on the part of the plaintiff failed to identify with certainty the particular engine which emitted the sparks. Evidence was offered on the part of the company to show that all its engines were, on the day of the fire, provided with the most approved apparatus to prevent the escape of fire, and that the apparatus was in good condition, but the evidence was rejected on the ground that it ought to be limited to the particular engine which did the damage. This was held erroneous.⁴ Proof that a locomotive did, on a certain day,

than a mere possessory one. *McNarra v. Chicago, &c. R. Co.*, 41 Wis. 69. In an action to recover for an injury to the freehold, plaintiff must show such title as entitles him to damages, not to the possession merely, but to the freehold. *Miller v. Long Island R. Co.*, 71 N. Y. 380. Where a person brings a suit to recover damages for a loss by fire of premises which he alleges to have belonged to him, the defendant may, in order to contradict the allegations of ownership, put in evidence the record of a judgment recovered by another party against an insurance company for the loss. This is some evidence, though not strong or important, that the plaintiff was not

the owner. *Albert v. Northern Central R. Co.*, 98 Penn. St. 316. When the facts are agreed, what constitutes negligence is a question of law, and the court can determine what is shown in the facts as readily and as fully as the district court. *Kansas Pacific R. Co. v. Butts*, 7 Kan. 309.

¹ *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193.

² *Missouri Pacific R. Co. v. Kincaid*, 29 Kan. 654.

³ *Pittsburgh, &c. R. Co. v. Noel*, 77 Ind. 110.

⁴ *Haley v. St. Louis, &c. R. Co.*, 69 Mo. 614.

cause two or more fires by the emission of sparks therefrom, and that other engines of the same company passed over the same road at the same place all that fall, prior to that day, under like conditions of wind, weather, etc., without causing any fires at or near that place, is some proof of negligence on the part of the company with regard to the particular engine which caused the fires, — either that it was not in good condition, or that it was not properly managed.¹ Where the evidence for the defendant, as to the construction and condition of its engines, is wholly uncontroverted, and is clear and decided to the point that they were properly constructed and equipped, and provided with all the most modern and approved appliances for preventing the escape of fire, it is error for the court to submit to the jury the question of the defective condition of such engines.²

Where a railway company directed its servants to set fire to the dry grass and weeds which had accumulated on its right of way, and in the carrying out of such orders the fire spread to the premises of an adjacent owner and destroyed his property, it was held, in a suit to recover for the damage occasioned, that any statements made by the company's servants while engaged in the performance of the act, concerning the same, were admissible in evidence against the company, as a part of the *res gestæ*.³ The fact that after the passage of

¹ Atchison, &c. R. Co. v. Stanford, 12 Kan. 354. The charge of the court to the jury, that if the defendant changed the smoke-stack of the engine that caused the fire, after the fire occurred, because the smoke-stack was worn out or defective, or for greater safety, the jury might consider the fact in determining whether the engine was in proper condition or not, was not erroneous as a legal proposition, where there was sufficient evidence upon this subject to authorize such an instruction. St. Joseph, &c. R. Co. v. Chase, 11 Kan. 47.

² Spaulding v. Chicago, &c. R. Co., 33 Wis. 582. In a Vermont case, the plaintiffs claimed, and their evidence tended to prove, that the fire by which their property was destroyed originated by fire communicated by the engines of the defendant. The defendant gave evidence to show that its engines were not permitted to run when not in good condition, or when defective in the fire-pans, dampers, screen, or smoke-stack, which are the only places where fire can escape. The plaintiffs then gave evidence, without objection, tending to show

that engines in suitable repair and of proper construction would not scatter fire so as to endanger property. It was held that it was proper for plaintiffs to show that, at or about that time, defendant's engines generally and habitually scattered fire in the vicinity of said property. Cleavelands v. Grand Trunk R. Co., 42 Vt. 449. It seems that proof that the engines in use on the railroad were properly inspected as often as once in two days, and found to be in proper order, is sufficient, although it does not come down to the very moment that the fire escaped which caused the injury, and show that at that time there was no defect in the engine. Spaulding v. Chicago, &c. R. Co., 30 Wis. 110.

³ Ohio, &c. R. Co. v. Porter, 92 Ill. 437. A complaint alleged that the defendant, by its servants, etc., negligently set fire to and destroyed the plaintiff's raspberry-patch. It was proved that the fire was started by means of a burning brand, thrown from a passing locomotive upon the defendant's own land, where it set fire to the grass, and the fire spread to the raspberry-patch,

a train, dry grass and other combustible materials were discovered on fire along the line of a railway is not, of itself, evidence of negligence on the part of the railway company.¹ But in connection with evidence showing that a fire might have been caused by a spark from an engine, and tending to disapprove the presence of any other cause, it will warrant a conclusion that a spark did escape.² The jury are not at liberty to infer negligence on the part of the defendant, from the absence, at the time of the fire, of the hands employed for the purpose of repairs on the section of the road where the fire occurred, and the failure by the company to assist in extinguishing it.³

SEC. 330. Negligence of the Property-Owner. — The owner of lands adjacent to a railway is not obliged to keep his lands contiguous to the track free from leaves or other combustible matter; he is not bound to guard against an improper or negligent use of locomotives, and is not bound to remove combustible material from his land in order to obviate the possible or even probable consequences of the company's negligence.⁴ So long as he makes a proper and

which it adjoined. It was not shown that the person who threw off the brand was in the employ of the defendant; but it was proved that he was upon the engine, and apparently engaged at work there, with his coat off. It was held that this fairly raised a presumption that such person was in the employ of the defendant, and was rightfully engaged at work upon the engine, in absence of all explanation. *McCoun v. N. Y. Central R. Co.*, 66 Barb. (N. Y.) 338. An agent having testified positively and of his own knowledge that certain cotton (for the negligent burning of which the action was brought) belonged to the plaintiffs jointly, said upon his cross-examination, "my books show how the cotton was owned." It was held that objection to the statement of the witness, in the absence of his books, as to the ownership of the cotton, was properly overruled. *Wilson v. Atlanta, &c. R. Co.*, 16 S. C. 587.

¹ *Reading, &c. R. Co. v. Latshaw*, 93 Penn. St. 449; *Karsen v. Milwaukee, &c. R. Co.*, 29 Minn. 12. Thus, a fire broke out on the defendant's line, about fifteen feet from the end of the ties, and to the leeward of the track, soon after the passing of a train, and spread to the adjacent premises of plaintiff. There was no direct evi-

dence as to the cause of the fire, or the condition or management of the engine; but the plaintiff's witnesses testified that a high wind was blowing at the time of the fire; that coals were found at the spot where it originated, although no wood, but only grass, was growing there; and that other fires broke out along the line of the railroad immediately after the passing of the same train. It was held that there was evidence to go to the jury that the fire was kindled by coals from the engine, and that the engine was defective. *Woodson v. Milwaukee, &c. R. Co.*, 21 Minn. 60.

² *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

³ *Baltimore, &c. R. Co. v. Shipley*, 39 Md. 251.

⁴ *Delaware, &c. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; *Salmon v. Delaware, &c. R. Co.*, 38 N. J. L. 5; 20 Am. Rep. 356; *Philadelphia, &c. R. Co. v. Schultz*, 93 Penn. St. 341; *Jacksonville, &c. R. Co. v. Peninsular Land Co.*, 27 Fla. 1, 157; *Pittsburgh, &c. R. Co. v. Jones*, 86 Ind. 496; 44 Am. Rep. 334; *Richmond, &c. R. Co. v. Medley*, 75 Va. 499; 40 Am. Rep. 734; *Union Pacific R. Co. v. Arthur* (Col. App.), 29 Pac. Rep. 1031; *Fort Scott, &c. R. Co. v. Tubbs*, 47 Kan. 630; 28 Pac. Rep. 612.

reasonable use of his property he is not chargeable with negligence in omitting to take precautions against fire from the engines of an adjoining railroad.¹ Thus, where the contributory negligence charged consisted in permitting an accumulation of hay and shavings between two buildings destroyed, and under one of them, which was set upon blocks two and one-half feet high, and with the side next the track left open below the sills, it was held that the question of contributory negligence should be submitted to the jury.² In a New York case, the plaintiff was accustomed to stable his horse in a barn situated within about two feet of the fence beside the defendant's road; the bedding and manure of the horses were thrown out of a window in the barn near the track, and allowed to accumulate during a hot, dry season, from the spring until in July, when it was set on fire by a spark from one of defendant's engines. It was held that the evidence of contributory negligence on the part of the plaintiff was sufficient to require the question to be submitted to the jury.³ A person is not bound to provide appliances to prevent fires arising from the negligence of a railway company.⁴

Damage caused by fire through the negligence of one party, but

Where a barn quite near a railway track was negligently burned by sparks from an engine, it was held not evidence of contributory negligence that the owner suffered the roof to be in such condition that it was more liable to take fire than if it had a secure and safe roof. *Philadelphia, &c. R. Co. v. Henderson*, 80 Penn. St. 182. In the case of *Sugarman v. Manhattan El. R. Co.*, 16 N. Y. Supp. 533, fire fell from the defendant's elevated road and set fire to plaintiff's awning. It was held that the fact that plaintiff, when she saw it, became frightened and ran away instead of trying to extinguish it did not render her guilty of contributory negligence, it not being shown that she could have prevented the fire. *Mills v. Chicago, &c. R. Co.*, 76 Wis. 422. But if a property-owner deliberately neglects to put out the fire when he could do so, he has no right of action against the company. *Eaton v. Oregon, &c. R. Co.*, 19 Oreg. 391.

¹ *Kellogg v. Chicago, &c. R. Co.*, 26 Wis. 223. One whose premises adjoin a railroad is not chargeable with contributory negligence simply because he took out

of doors and used upon his premises an inflammable article necessary to be used in the business carried on on the premises, to which, through the negligence of the railroad company, fire was communicated by sparks from one of its engines; the mere location of the road and its use do not operate as a prohibition upon certain branches of industry in its vicinity which may be endangered by such use. *Kalbfleish v. Long Island R. Co.*, 102 N. Y. 520. The question whether the mulching of the trees in an orchard with manure, and wrapping them with dry straw, is such contributory negligence as will defeat a recovery for their destruction by fire set by sparks from an engine, is for the jury. *Missouri Pacific R. Co. v. Cornell*, 30 Kan. 35; 11 Am. & Eng. R. Cas. 56.

² *Murphy v. Chicago, &c. R. Co.*, 45 Wis. 222.

³ *Collins v. N. Y. Central R. Co.*, 5 Hun (N. Y.), 499; *affirmed*, 71 N. Y. 609.

⁴ *McLaren v. Canada Central R. Co.*, 32 U. C. C. P. 324. See also *Richmond, &c. R. Co. v. Medley*, 75 Va. 499; *Philadelphia, &c. R. Co. v. Henderson*, 80 Penn. St. 182.

increased through the negligence of the party suffering the loss, may be recovered up to the time when the contributory negligence began to affect the result; hence there was error in the charge to the jury, when it would be understood by them that, if the plaintiff neglected to do what a prudent man would have done when he learned of the fire, it defeated his right of recovery for the previous as well as subsequent damages.¹

If a person places cord-wood upon the right of way of a railroad, under contract, express or implied, with the company so to do, he does not thereby contribute to an injury caused by the destruction of the wood by fire communicated from a passing engine.² The fact that the plaintiff had not ploughed around stacks, so as to prevent fire from reaching them, is not negligence *per se*. Whether it amounts to negligence is a question of fact to be determined by the circumstances of the case.³ Persons who live near railroads are bound to

¹ *Stebbins v. Central Vt. R. Co.*, 54 Vt. 464.

² *Pittsburgh, &c. R. Co. v. Nelson*, 51 Ind. 150.

³ *Karsen v. Milwaukee, &c. R. Co.*, 29 Minn. 12; *Burlington, &c. R. Co. v. Westover*, 4 Neb. 268; *Lindsay v. Winona, &c. R. Co.*, 29 Minn. 411; *Kansas City, &c. R. Co. v. Owen*, 25 Kan. 419; *Kansas Pacific R. Co. v. Brady*, 17 Kan. 380. Persons occupying farms along railroads are entitled to cultivate and use them in the manner customary among farmers, and may recover for damages by fire caused by the negligence of the railway company, although they have not ploughed up the stubble or taken any other unusual means to guard against such negligence. In the exercise of his lawful rights every person has the right to presume that every other will perform his duty and obey the law, and it is not negligence for him to assume that he is not exposed to danger which can only come to him through a disregard of law on the part of some other person. Where sparks from the defendant's engine set fire to dry grass, weeds, and bushes, suffered to remain and accumulate on land used for the railway, and the fire, spreading upon plaintiff's lands, destroyed his property, the question whether defendant was negligent in leaving its land in that condition, was prop-

erly left to the jury. It was not error, as against defendant, to submit to the jury the question whether plaintiff was also negligent in not ploughing a strip to prevent the spread of fire. The fact that the fire passed through intervening fields and destroyed plaintiff's property does not render the damages remote. The fact that the fire would not have spread but for the dry weather and strong wind does not affect defendant's liability. The drought and high wind are ordinary and not extraordinary circumstances. *Kellogg v. Chicago, &c. R. Co.*, 26 Wis. 223. Compare *Keese v. Chicago, &c. R. Co.*, 30 Iowa, 78, where it is held that while the owner of land has the right to stack his grain or hay on premises adjacent to a railway, and thereby only takes the risk of accident by fire not occasioned by the company's negligence, yet if he is guilty of negligence himself in not ploughing around the stacks, or in omitting to do such acts as would have protected the property and prevented the loss, this would be a case of contributory negligence, and he would not be permitted to recover against the company, although it were also guilty of negligence in permitting an accumulation of dry grass and weeds along its track, in which the fire was ignited by sparks from the engine of a passing train.

take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it.¹ And persons occupying farms along a line of railway are entitled to cultivate them in the usual manner, and may recover damages for fires caused by the negligence of the railway company, although they have not ploughed up the dry grass or taken other unusual means to guard against injuries by fire.² In an action against a railway company to recover the value of certain stacks of oats, destroyed by a fire set by its engine, evidence of the custom of the neighborhood, not to plough around the stacks, is not competent for the purpose of showing a want of contributory negligence.³ A party cannot be chargeable with negligence for not doing that which, if done, would afford him no protection; and evidence tending to show that the plaintiff's failure to plough around his hay-stacks did not contribute to the loss is admissible.⁴ The fact that a farmer permits dry grass and other combustible matter to remain on his land does not constitute contributory negligence on his part so as to prevent him from recovering against a railway company for the destruction of property there situate, caused by fire escaping from a passing train and driven by a high wind through similar combustible matter on the company's right of way and on an intervening farm.⁵

Though a burning railway-car which is run off on a switch to save the train and main track is negligently stopped so near another's

¹ Kansas City, &c. R. Co. v. Owen, 25 Kan. 419.

² Snyder v. Pittsburgh, &c. R. Co., 11 W. Va. 14.

³ Ormond v. Central Iowa R. Co., 58 Iowa, 742.

⁴ Lewis v. Chicago, &c. R. Co., 57 Iowa, 127.

⁵ Palmer v. Missouri Pacific R. Co., 76 Mo. 217; Erd v. Chicago, &c. R. Co., 41 Wis. 65; Pittsburgh, &c. R. Co. v. Hixon, 79 Ind. 111. Negligence of the plaintiff, to release the defendant from liability, must be the *proximate cause of the injury*; and the negligence of a railway company in leaving dry grass and weeds upon its right of way, whereby a fire was communicated to the field of the plaintiff, was the proximate cause of the injury. Flynn v. San Francisco, &c. R. Co., 40 Cal. 14; Pittsburgh, &c. R. Co. v. Jones, 86 Ind. 496; Palmer v. Missouri, &c. R. Co., 76 Mo. 217; Richmond, &c. R. Co. v. Medley,

75 Va. 486. Where the conduct of defendant's agents was the immediate and proximate cause of the injury, it is no defence that the plaintiff was guilty of remote negligence in leaving grass in the fence-corners adjacent to the road, whereby the fire was kindled. Fitch v. Pacific R. Co., 45 Mo. 322. The damages are not too remote where the property consumed was separated from the track by a strip of ground forty or fifty yards wide, where the plat was covered with dry grass and other combustible matter. Clemens v. Hannibal, &c. R. Co., 53 Mo. 366. In case of fire communicated because of dry grass and weeds accumulating upon the right of way, the question of comparative negligence on the part of the plaintiff and the company, in respect to the accumulation of such combustible material, is a question of fact properly left to the jury. Illinois Central R. Co. v. Nunn, 51 Ill. 78.

property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents or employes having charge of it, *are present and can save it, but refuse to do so*; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the damages; but agents or employes of the owner in other business, not connected with the property, are under no legal obligation to protect it, and *their omission to do so is not contributory negligence on the part of the owner.*¹ But the fire having originated thirty or forty rods from the plaintiff's land, and the only evidence bearing on his negligence being that he saw smoke rising from defendant's track on two or three days, — the last time being eight days before his property was burned, — and took no measures to have the fire extinguished, it was held that this would not sustain a finding of contributory negligence.² But where fire is communicated to a building, the owner cannot recover for the loss of such property, *if he could easily and without danger have saved it from destruction.*³ But he is not bound to use extraordinary means to extinguish or prevent the spread of the fire.⁴

The fact that the building would not have been set on fire if the plaintiff had not left a window open facing the railway is not a defence. Thus, in an action against a railway company, by the owner of land lying contiguous to the defendant's track, to recover damages for the burning of a house situated on the land, and of personal property therein belonging to him, alleged to have been caused by sparks escaping from the locomotive used by the defendant, which was not provided with a sufficient spark-arrester, the jury, with their verdict for the plaintiff, found specially that the plaintiff's house was set on fire by sparks emitted from the smoke-stack of an engine which was provided with an improper, defective, and unsafe spark-arrester; that if the engine had had a proper spark-arrester the burning could not have occurred; that the sparks entered an unoccupied upper room of the house, through a window fronting on the track, left open by the plaintiff; and that though the opening of the window contributed to the burning, yet, as the plaintiff did not know of the use or presence of the defective engine, he was not guilty of

¹ St. Louis, &c. R. Co. v. Hecht, 38 Ark. 357.

² McNarra v. Chicago, &c. R. Co., 41 Wis. 69.

³ Chicago & Alton R. Co. v. Pennell, 94 Ill. 448.

⁴ Bevier v. Delaware, &c. Co., 13 Hun (N. Y.), 254.

negligence in having the window open. It was held that the defendant was not entitled to judgment on the special verdict.¹ In the absence of evidence tending to show whether the plaintiff was or was not negligent, the court should direct, and the jury should find, that he was not negligent.² Where a party erects his building at a reasonably safe distance from the railroad track, he cannot be held guilty of negligence because it is so situated as to be liable to be set on fire by another, subsequently erected in dangerous proximity to the track.³ And where a railway is constructed at such a distance from a building that it is not likely to be set on fire by sparks from engines properly constructed, it is not negligence in the owner not to remove the building.⁴

The erection of buildings by the permission of a railroad company within the line of its roadway by other parties, for convenience in delivering and receiving freight, is not inconsistent with the purposes for which the charter was granted; and a license by the company to such other parties is admissible to show its consent to the occupation of its premises.⁵ A party who erects a building on or near a railway track knows the dangers incident to the use of steam as a motive power, and must be held to assume some of the hazards connected with its use on such thoroughfares. While he has the right to erect a building near the track, and in an exposed position, yet if he does so, he is bound to a higher degree of care in providing proper means to protect his property from fire than a person in a less exposed position, and is also required to use all reasonable means to save his property in case a fire should occur.⁶

Warehousemen who have authorized the use of a locomotive on their premises, and have known of its use and acquiesced in it, have no right of action for damage done to their property by fire set by

¹ Louisville, &c. R. Co. v. Richardson, 66 Ind. 43.

² Central Branch Union Pacific R. Co. v. Hotham, 22 Kan. 41.

³ Toledo, &c. R. Co. v. Maxfield, 72 Ill. 95.

⁴ Caswell v. Chicago, &c. R. Co., 42 Wis. 193. Where a statute provides that "when an injury is done to a building or other property by fires communicated by a locomotive-engine of any railroad corporation, the corporation shall be responsible in damages for such injury," and have an insurable interest in such property "along

its route," it was held that the phrase "along its route" means in proximity to the rails upon which the locomotive-engines run; and that the corporation is liable for such an injury to buildings or other property along its route, whether they are outside of the lines of its roadway or lawfully within those lines. Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

⁵ Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

⁶ Chicago & Alton R. Co. v. Pennell, 94 Ill. 448.

sparks from such engine. Thus, the owners of a warehouse owned a railway track running on their own premises near it, and employed a railway company to send an engine to draw ears over it for their accommodation. The engine threw off sparks badly, and this they observed and complained of, but nevertheless continued to make use of it for a long time. At last the warehouse was burned by sparks emitted from the engine, and it was held that the plaintiff had no redress therefor, as he had virtually licensed the use of the defective engine.¹

SEC. 331. Statutory Liability. — In some of the States it is provided by statute that the fact that a fire is set by sparks, etc., from an engine shall be *prima facie* evidence of negligence. But this merely makes proof of the communication of fire evidence sufficient, in the absence of proof that the company was not in fact negligent, to warrant a verdict against the company.² It is not sufficient, to

¹ Spear v. Marquette, &c. R. Co., 49 Mich. 246.

² Pittsburgh, &c. R. Co. v. Campbell, 86 Ill. 443; Chicago, &c. R. Co. v. Clam-pit, 63 Ill. 95; Small v. Chicago, &c. R. Co., 50 Iowa, 338; Slosson v. Burlington, &c. R. Co., 51 Iowa, 294; Philadelphia, &c. R. Co. v. Stebbing, 62 Md. 504; Annapolis, &c. R. Co. v. Gantt, 39 Md. 115; Baltimore, &c. R. Co. v. Shipley, 39 Md. 251; Karsen v. Milwaukee, &c. R. Co., 29 Minn. 12; 7 Am. & Eng. R. Cas. 501; Sibirud v. Minneapolis, &c. R. Co., 29 Minn. 58; Johnson v. Chicago, &c. R. Co., 31 Minn. 57; 13 Am. & Eng. R. Cas. 460; Fitch v. Pacific R. Co., 45 Mo. 325; Bedford v. Hannibal, &c. R. Co., 46 Mo. 456; Burlington, &c. R. Co. v. Westover, 4 Neb. 268; Longabaugh v. Virginia City R. Co., 9 Nev. 271; Anderson v. Wasatch, &c. R. Co., 2 Utah, 518; Spaulding v. Chicago, &c. R. Co., 30 Wis. 110; 1 Thompson on Neg., p. 153, § 3; 5 U. S. Stat. at Large, 306. See also Denver, &c. R. Co. v. DeGraff (Col. App.), 29 Pac. Rep. 664, holding that plaintiff is not required to prove negligence, but he must prove the fact of injury, and show that the fire originated from one of defendant's locomotives. The statutory presumption renders an allegation of negligence on the part of the company unnecessary in the petition or complaint. Engle v. Chicago, &c. R. Co. (Iowa), 37 N. W. Rep. 6;

Smith v. Humeston, &c. R. Co., 78 Iowa, 583. Evidence that fire started in a field about 116 feet from the track a few minutes after a train passed by, and that no other fire, or person setting fire, was seen near there on that day is sufficient to prove *prima facie* that the locomotive was the origin of the fire. Greenfield v. Chicago, &c. R. Co. (Iowa), 49 N. W. Rep. 95.

In Mississippi and Georgia, the statutory presumption extends to *all* cases of injury whether by fire or otherwise. Louisville, &c. R. Co. v. New Orleans, &c. R. Co., 67 Miss. 399; Mobile, &c. R. Co. v. Dale, 61 Miss. 206; 20 Am. & Eng. R. Cas. 651; Vicksburgh, &c. R. Co. v. Phillips, 64 Miss. 693; 30 Am. & Eng. R. Cas. 587; Columbus, &c. R. Co. v. Kennedy, 78 Ga. 646; 31 Am. & Eng. R. Cas. 92; Central R. Co. v. Brinson, 64 Ga. 475; 8 Am. & Eng. R. Cas. 337; Jones v. Bond, 40 Fed. Rep. 281. Proof by the testimony of the engineer and the fireman that the day after the injury the engine was in perfect order, and that the engine had been properly handled at the time of the alleged injury, is not conclusive to rebut the statutory presumption, where it appears that each of the witnesses had only made a cursory examination of the engine in oiling it and cleaning it out. Hoffman v. Chicago, &c. R. Co., 43 Minn. 334.

rebut this presumption, for the company to show that its engines were provided with the best and most approved appliances; but it must also show that they were properly and carefully managed,¹ and that its roadway was kept clear of dry and combustible matter.² In such cases it is sufficient for the plaintiff to show that the fire was set by the company's engines, etc., and the burden is thrown upon the company of showing that it was not set by its negligence.³

In some of the States railway companies are made liable, irrespective of the question of negligence, for fires set by their engines, and as a compensation for this extraordinary liability are given an insurable interest in such property; and these statutes have been held to be constitutional, even in their application to corporations established before the statute was passed, and although damages for the risk of fire were considered when the land was taken.⁴ Where the statute extends to "buildings or other property," it covers woodlands or growing trees,⁵ and other property real or personal,⁶ and embraces all property destroyed by the fire first communicated by such engines.⁷ Under these statutes the plaintiff is only required to show that the fire was communicated from the defendant's "engines;" and no degree of care on the part of the defendant will defeat its

¹ St. Louis, &c. R. Co. v. Funk, 85 Ill. 460. To rebut the presumption, the company must show not only that the engine was equipped with the most approved appliances, but also that they were in proper order and repair at the time, that there was no negligence in their use, and that the engine was managed by a skilled engineer. Missouri Pac. R. Co. v. Texas, &c. R. Co., 41 Fed. Rep. 917; Chicago, &c. R. Co. v. Goyette, 133 Ill. 21.

² Pittsburgh, &c. R. Co. v. Campbell, 86 Ill. 443.

³ Annapolis, &c. R. Co. v. Gantt, 39 Md. 115; Sibirud v. Minneapolis, &c. R. Co., 29 Minn. 58; Campbell v. St. Louis, &c. R. Co., 58 Mo. 498; Coates v. West Jersey R. Co., 44 N. J. L. 247; Anderson v. Wasatch, &c. R. Co., 2 Utah, 518.

⁴ Lyman v. Boston, &c. R. Co., 4 Cush. (Mass.) 288; Pierce v. Worcester, &c. R. Co., 105 Mass. 199; Grissell v. Housatonic R. Co., 54 Conn. 447; 32 Am. & Eng. R. Cas. 349; Rodemacher v. Milwaukee, &c. R. Co., 41 Iowa, 297. But under the Connecticut statute (Gen. St. Conn., § 3581) which makes a railroad company

liable for losses by fire from its engines, whether they are the result of its *negligence* or not, and which gives the company an insurable interest in the property, the company is not entitled to a reduction of damages to the extent of the insurance on the property paid to plaintiff by his insurers. Regan v. New York, &c. R. Co., 60 Conn. 124. See also Connecticut Mut. L. Ins. Co. v. New York, &c. R. Co., 25 Conn. 265.

⁵ Ross v. Boston, &c. R. Co., 6 Allen (Mass.), 87; Pratt v. Atlantic, &c. R. Co., 42 Me. 579; Grissell v. Housatonic, &c. R. Co., 54 Conn. 447.

⁶ Ross v. Boston, &c. R. Co., 6 Allen (Mass.), 87; Haseltine v. Concord, &c. R. Co., 64 N. H. 545 (liable for wood or coal deposited by dealer near the track). But see, *contra*, holding that it does not apply to movable property, Chapman v. Atlantic &c. R. Co., 37 Me. 92, — as, a lot of cedar posts cut and piled near the railway. Pratt v. Atlantic, &c. R. Co., 42 Me. 579.

⁷ Hart v. Western R. Co., 13 Met. (Mass.) 99.

liability; the company's liability is that of insurer, and the contributory negligence of the plaintiff, unless it amounts to actual fraud by an intentional exposure of the property, will not, therefore, operate as a defence.¹

In the Kansas statute, it is provided that if the plaintiff recover in an action against the company for loss by fire, "there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment. But this does not authorize the court, after the jury has returned a verdict in plaintiff's favor, to assess, on motion, an amount as attorney's fee; the question as to what is a reasonable attorney's fee is one of fact for the jury.² The amount allowed for such fee, when found, is a part of the judgment in plaintiff's favor, and need not be separately found by the jury, except in answer to a special interrogatory. A fire caused by the negligence of the company's servants in burning material on the right of way is within the statute, the language providing for liability for injuries sustained as a result of fire caused by the operation of a railroad.⁴

Proof that the fire occurred while the engine was running at a rate of speed greater than that allowed by law does not of itself establish the liability of the company. As in other cases the plaintiff must show that the violation of law was the proximate cause of the injury; that the injury would not have occurred but for the violation of the statute. If the unlawful rate of speed necessitated greater steam pressure, and an unusual number of sparks were thrown out in consequence, the jury might very properly find that the unlawful rate of speed was the proximate cause of the injury. But there is no reason in holding that the mere fact that the company was violating a statute at the time the fire occurred is sufficient to establish its liability, and where there is no other proof than this the case should not go to the jury.⁵

¹ Rowell v. Railroad Co., 57 N. H. 132. See also as to statutory liability for fire, Haseltine v. Concord R. Co., 64 N. H. 545.

² Ft. Scott, &c. R. Co. v. Tubbs, 47 Kan. 630; Missouri Pacific R. Co. v. Lea, 47 Kan. 268; 27 Pac. Rep. 987; Gen. St. Kan. (1889), § 1322; Laws of 1885, c. 155, § 2. Such fees can only be allowed when they are asked for in the petition or complaint, and the question submitted in trying the case on its merits. Ft. Scott, &c. R. Co. v. Karracker, 46 Kan. 511.

³ Missouri Pacific R. Co. v. Henning, 48 Kan. 465; 29 Pac. Rep. 597.

⁴ Missouri Pacific R. Co. v. Cady, 44 Kan. 633, 636; 24 Pac. Rep. 1088.

⁵ Brusberg v. Milwaukee, &c. R. Co., 50 Wis. 231; 2 Am. & Eng. R. Cas. 264. In the case of Martin v. West, &c. R. Co., 23 Wis. 437, DIXON, J., speaking for the court said: "We have no doubt that the danger to buildings and other adjacent property liable to injury and destruction by fire caused by the emission of coals and sparks from the engine in rapid motion

SEC. 332. Remote Fires.—A railway company is not excused from liability because the fire injuring or destroying the plaintiff's property first fell upon the land of another, and from thence was communicated to the plaintiff's land by means of dry grass, stubble, or other combustible materials, or even passes over the land of several intervening owners before it reaches the plaintiff's land, at a great distance from the point where it was first kindled.¹ Thus, where a spark from a locomotive set fire to grass near the track and spread in a direct line, without break, across land of several different proprietors, and a highway, to the plaintiff's woodland half a mile away, it was held responsible for the injury.² So, where a fire was set by sparks from a locomotive-engine to wood piled against a freight-house at the railroad-station in a village, which consumed the freight-house and spread to and injured the station-house, which was thirty feet distant from the freight-house, and a dwelling-house about six-

was one of the mishaps which the statute limiting the rate of speed through cities and villages was designed to prevent, and are therefore of the opinion that for losses so occasioned by trains moving at a greater rate of speed than the statute prescribes, the company is responsible." But in each of these cases the rule of the text was fully sustained. See also *Chicago, &c. R. Co. v. Goyette*, 133 Ill. 21.

¹ *Atchison, &c. R. Co. v. Bates*, 16 Kan. 252; *Pennsylvania R. Co. v. Hope*, 80 Penn. St. 373; *Butcher v. Vaca, &c. R. Co.*, 67 Cal. 518; 22 Am. & Eng. R. Cas. 644; *Louisville, &c. R. Co. v. Ehler*, 87 Ind. 339; 11 Am. & Eng. R. Cas. 61; *Toledo, &c. R. Co. v. Knoxfield*, 72 Ill. 95; *Pennsylvania R. Co. v. Lacey*, 89 Penn. St. 458; *Webb v. Rome, &c. R. Co.*, 49 N. Y. 420; *Field v. N. Y. Central R. Co.*, 32 N. Y. 339; *Troxler v. Richmond, &c. R. Co.*, 74 N. C. 377; *Burlington, &c. R. Co. v. Westover*, 4 Neb. 268; *Kellogg v. Chicago, &c. R. Co.*, 26 Wis. 223; *Hoyt v. Jeffers*, 30 Mich. 181; *Toledo, &c. R. Co. v. Mathersbaugh*, 71 Ill. 572; *Fent v. Toledo, &c. R. Co.*, 59 Ill. 349; *McCoun v. New York Central R. Co.*, 66 Barb. (N. Y.) 338; *Atchison, &c. R. Co. v. Stanford*, 12 Kan. 354; *Delaware, &c. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; 38 N. J. L. 5; 20 Am. Rep. 356; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *St. Joseph, &c. R. Co. v. Chase*,

11 Kan. 47; *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469; *Philadelphia, &c. R. Co. v. Constable*, 39 Md. 149; *Baltimore, &c. R. Co. v. Shipley*, 39 Md. 251; *White v. Colorado, &c. R. Co.*, 5 Dill. (U. S.) 428; *Smith v. London, &c. Ry. Co.*, L. R. 5 C. P. 98.

² *Perley v. Eastern R. Co.*, 98 Mass. 414. Where there is evidence that after the fire started on defendant's right of way, the wind changed, thereby sweeping the fire on to plaintiff's property, it is for the jury to say whether the fire set by defendant was the proximate or remote cause of the injury. *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252; 47 N. W. Rep. 972. See also *Green Ridge R. Co. v. Brinkman*, 64 Md. 52; 20 Atl. Rep. 1024 (fire commencing after it was supposed to have been extinguished—question left to the jury as to the efficient cause of the injury). The controversy between some of the authorities as to liability for the consequences of extended fires arises in a measure from a misapprehension of the doctrine of proximate cause. The defendant's wrongful act may be the proximate cause of an injury which could not have been foreseen or anticipated; the only criterion is whether an efficient cause intervened between the wrongful act and the injury complained of. See *ante*, § 319, 16 Am. & Eng. Ency. Law, pp. 436 *et seq.*

teen hundred feet distant from the station-house, and seven hundred and forty feet from the track, caught fire from sparks wafted from this conflagration, and was injured, it was held that the railroad company was liable for the injury.¹ So it has been held liable for injuries from fire where it has spread to property eight miles away,² being swept by a high wind in such a manner that the consequences might have been anticipated. In a New Jersey case³ the court stated the rule to be that where a fire originates in the negligence of another, and is not immediately communicated to the property destroyed, but is communicated from one building to another until it reaches the property destroyed, casual connection will only cease when between the negligence and the damage an object is interposed which would have prevented the damage, if due care had been taken. In such case, when the burning matter is oil, a running stream may form a natural link in the chain of causation. Where a fire originates in the carelessness of a defendant, and is carried directly by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or a running stream, to the plaintiff's property, and destroys it, the defendant is legally answerable for the loss. But in a Pennsylvania case⁴ it was held that an act is not to be considered the proximate cause of an injury, unless the injury was such a consequence as under the surrounding circumstances of the case, might and ought to have been foreseen by the actor as likely to flow from his act; and that where, owing to failure of the engineer of an oil train seasonably to observe an earth-slide upon the track, the train was thrown off, the oil-cars burst, and the ignited oil was carried by the waters of a creek against buildings of an adjacent land-owner, destroying them by fire, the company could not be held chargeable for the loss.⁵ It is now generally held that

¹ *Safford v. Boston & Maine R. R. Co.*, 103 Mass. 583.

² *Poeppers v. Missouri, &c. R. R. Co.*, 67 Mo. 715.

³ *Kuhn v. Jewett*, 32 N. J. Eq. 647.

⁴ *Hoag v. Lake Shore, &c. R. R. Co.*, 85 Penn. St. 293.

⁵ *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; *Ryan v. N. Y. Central R. R. Co.*, 35 N. Y. 210. But this rule has been repudiated in New York, and it is now held that the company is liable for injuries from a fire although it is transmitted over intervening lands. *Webb v. Rome, &c.*

R. R. Co., 49 N. Y. 420. See also *Milwaukee, &c. R. R. Co. v. Kellogg*, 94 U. S. 474; *Oil Creek, &c. R. R. Co. v. Keighron*, 74 Penn. St. 316; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; *Penn., &c. R. R. Co. v. Lacey*, 89 Penn. St. 458. Connected with a railway was a branch on which were oil-stations, where the main company left its cars to be filled by the owners of the oil, and then moved them. Two cars coupled together were placed at a station on a steep grade, under charge of the oil company's superintendent, none of the railway company's employes being there. The

the intervention of a new and independent agency is necessary to prevent liability, and the circumstance that the fire was spread by the wind will not defeat liability.¹ In an English case, workmen employed by the defendant, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble-field beyond, and was there carried by a high wind across the stubble-field and over a road, and burnt the plaintiff's cottage, which was situated about two hundred yards from the place where the fire broke out. There was evidence that an engine belonging to the defendant had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine; nor was there any evidence that the fire began in the heaps of trimmings, and not on the parched ground around them. It was held that it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed; that there was evidence for the jury that the defendant was negligent in leaving the dry trimmings; that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field; and that if the defendant was negligent it was responsible for the injury that resulted from its conduct to the plaintiff, although it could not have reasonably anticipated that such injury would be caused by it.² Where *two* fires are caused by sparks emitted from one of the defendant's engines, and neither of the fires is kindled on the land of the plaintiff, but each is kindled on the land of a different owner, and these two fires spread, finally uniting, and then pass over the property of several landed proprietors and finally reached the plaintiff's property, three and a half to four miles distant from where the fires were first kindled,

superintendent having filled one car, detached it to fill another; the first car ran down the grade and collided with an engine, which set fire to the cars and burned a neighboring house. In a suit against the company for burning the house, it was held that, as between the company and third persons, it was liable for the negli-

gence of the superintendent as that of its own employé. *Oil Creek R. R. Co. v. Keighron*, 74 Penn. St. 316.

¹ *Kenney v. Hannibal, &c. R. R. Co.*, 70 Mo. 252.

² *Smith v. London, &c. Ry. Co.*, L. R. 6 C. P. 14; *Smith v. London Ry. Co.*, L. R. 5 C. P. 98.

and there do damage, the damage is not too remote to be recovered.¹ In a Missouri case sparks escaping from a railroad locomotive set fire to the prairie adjoining the company's right of way at a place where the grass was very rank and dry. The wind being high, the fire extended some three miles before night, and continued to burn during the night, though slowly, the wind having fallen. The following morning the wind rose again and blew with great violence, carrying the fire some five miles further in the course of a few hours, to the plaintiff's farm, where it swept over a fire-line of sixteen feet of ploughed ground and destroyed plaintiff's property. Such violent winds were not infrequent in that country. In an action of damages against the company, it was held that, as a rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company of the consequences of its negligence in permitting the fire to escape; and as the fire was in fact one continuous conflagration, notwithstanding the lapse of time and the great distance over which it travelled before reaching plaintiff's property, a judgment in his favor was affirmed.² So where the sparks from the defendant's engine set fire to certain stubs of grass, where the grass had been previously mown, and the fire thus kindled spread until it reached the plaintiff's property, thirty rods distant, and then consumed the property; and where the stubs of grass, the ground over which the fire spread, as well as the property consumed by the fire, and for which the plaintiff sued, all belonged to the plaintiff, the damage to the plaintiff caused by the fire was held not too remote to constitute the basis of an action.³ And generally it may be said, if by the negligence of a railroad company, a fire, communicated from the sparks of an engine, commences on the premises of one proprietor and spreads to those of another, and destroys his crop, the latter may recover damages for the injury, *if the injury was the direct consequence of the original firing*.⁴ Thus, where grass and herbage on the right of way of a railroad was set burning by fire from an engine, the fire spreading rapidly and burning continuously until it reached the farm of plaintiff, situated a half-mile from the track, destroying straw, timber, etc., it was held that the damage was not too remote to be

¹ Atchison, Topeka, &c. R. R. Co. v. Stanford, 12 Kan. 354.

² St. Joseph, &c. R. R. Co. v. Chase, 11 Kan. 47.

³ Poeppers v. Missouri, &c. R. R. Co., 67 Mo. 715; Hightower v. Missouri, &c. R. R. Co., 67 Mo. 726.

⁴ Henry v. Southern Pacific R. R. Co., 50 Cal. 176.

recovered.¹ So, in an action for damages against a railroad company for the destruction of plaintiff's fence by fire, it appeared that the plaintiff's fence was three-fourths of a mile from the fence which was first ignited by sparks emitted from an engine of the defendant, but was connected with it by a continuous line of fence joined together by intermediate land-owners, and that the owner of the fence which originally caught on fire was guilty of contributory negligence. It was held that the negligence of the plaintiff in connecting with such fence was *remote*, and did not affect his right to maintain the action.² But where a new and independent agency intervenes, or when the transmission of the fire is not direct and continuous, so that the consequences could have been anticipated, liability cannot be predicated against the company. Thus, where it appeared that a warehouse standing near the railroad-track was set on fire from sparks escaping from an engine, and that at the time there was a strong wind blowing in the direction of the plaintiff's stable, which was situated one hundred and one rods from the warehouse, and that there was no combustible material intervening, but that the high wind carried brands from the burning warehouse to the stable of plaintiff, which caused it to take fire, it was held that the burning of the stable was not the natural and proximate consequence of the burning of the warehouse, and that the railway company was not liable therefor.³ But the negligence of a third person in not stopping the fire will not defeat the company's liability. Thus, in an action to recover the value of an elevator alleged to have been burned by fire communicated to it from the building of another, which was set on fire by sparks from a locomotive on the defendant's railroad, it was held that the contributory negligence of the owner of the building first burned would not constitute a defence.⁴ The question of negligence in such cases was held to be for the jury to determine.⁵

In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the defendant's engine, — as, where it has spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, — it is a question

¹ *Burlington & Missouri River R. R. Co. v. Westover*, 4 Neb. 268.

² *Doggett v. Richmond & Danville R. R. Co.*, 78 N. C. 305.

³ *Toledo, &c. R. R. Co. v. Muthersbaugh*, 71 Ill. 572.

⁴ *Small v. Chicago, &c. R. R. Co.*, 55 Iowa, 582.

⁵ *Kellogg v. Milwaukee, &c. R. R. Co.*, 5 Dill. (U. S. C. C.) 537.

proper to be submitted to the jury, to determine, from all the facts of the case, whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by "some intervening force or power, which stands naturally as the cause of the misfortune."¹ Thus, where a crop is destroyed by fire on the line of a railroad, and the fire originates from a spark emitted from the engine, which ignites the grass some distance from the crop, the question whether the destruction of the crop was the proximate result, to be reasonably expected from the carelessness of the railway company, is one of fact for the jury.² In a Pennsylvania case, sparks were thrown from an engine to a point on land adjoining the plaintiff's, about three hundred feet from a lumber-pile belonging to the plaintiff. The sparks set fire to combustible materials, consisting of leaves, briars, brush, stumps, and logs, burning the same in its pathway, until it reached the plaintiff's lumber. The weather was dry, and a high wind was blowing in the direction of the property destroyed. The fire reached the lumber about two hours after it started, and could not be extinguished by any effort. In a suit for the loss, there was evidence on the part of defendant tending to another theory as to the origin and extent of the fire. It was held that it was properly left to the jury to determine whether the negligence of defendant was the proximate or remote cause of the injury.³ So where sparks from the defendant's engine set fire to a railway-tie, from which rubbish left by the defendant on its road was fired, communicated with the plaintiff's fence next to the road, and spread over two fields, burned another fence and standing timber six hundred feet distant from the road, it was held that the proximity of the cause was for the jury.⁴ And the finding of the jury, that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, which had been caused by defendant's negligence, is, in effect, a finding that there was no intervening and independent cause between the negligent conduct of the defendant and the injury to the plaintiff.⁵

¹ Annapolis & Elk Ridge R. R. Co. v. Gantt, 39 Md. 115; Philadelphia, &c. R. R. Co. v. Constable, 39 Md. 149.

² Perry v. Southern Pacific R. R. Co., 50 Cal. 573.

³ Lehigh Valley R. R. Co. v. McKeen, 90 Penn. St. 122.

⁴ Pennsylvania R. R. Co. v. Hope, 80 Penn. St. 373.

⁵ Milwaukee, &c. R. R. Co. v. Kellogg, 94 U. S. 469.

CHAPTER XX.

TORTS, LIABILITY OF CORPORATION FOR.

- SEC. 333. Liability Generally.
334. Liability for Injuries to Real Estate.
335. Equitable Remedies for Nuisances.
336. Liability for Breach of Public Duty.
337. Liability to Indictment.
338. Who may sue.
339. Legislative Authority restricted.

- SEC. 340. Railroad Grants must be exercised in Conformity to Charter.
341. Restrictions upon Railroads.
342. Restrictions upon all Legislative Grants.
343. Private Ways.
344. Duty as to Private Crossings.
345. Liability where Road is operated by Receiver or Trustees.
- 345 a. Crimes against Railroads.

SEC. 333. **Liability Generally.**—Whatever may formerly have been the rule, it is now well settled that corporations, like individuals, are liable for all species of torts committed by them in their corporate capacity, or by their servants acting for them, as well for those which involve malice, as those which do not.¹ Thus, a corporation is civilly liable for vexatiously obstructing one's trade,² for assault,³

¹ *Brokaw v. New Jersey R. Co.*, 32 N. J. L. 332; *New York, &c. R. Co. v. Schuyler*, 34 N. Y. 49; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *National Car Brake Co. v. Lake Shore, &c. R. Co.*, 4 Fed. Rep. 219; *Penn. R. Co. v. Vandiver*, 42 Penn. St. 365; *Williams Planters' Ins. Co.*, 57 Miss. 759; *Carter v. Home Machine Co.*, 51 Md. 290; *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469; *Emigh v. Chicago, &c. R. Co.*, 1 Biss. (U. S.) 400; *Philadelphia, &c. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Turrill v. Ill. Central R. Co.*, 3 Biss. (U. S.) 52; *Boagher v. Life Assoc.*, 75 Mo. 319; 42 Am. Rep. 413; *Evening Journal Assoc. v. McDermott*, 44 N. J. L. 430; 32 Am. Rep. 392; *Vance v. Erie R. Co.*, 33 N. J. L. 334; *York, &c. R. Co. v. Winans*, 17 How. (U. S.) 30; 21 How. (U. S.) 88; *Sayles v. Chicago, &c. R. Co.*, 1 Biss. (U. S.) 463; 3 id. 52;

Winans v. Schenectady, &c. R. Co., 2 Blatchf. (U. S.) 279; *Eastern Counties Ry. Co. v. Broom*, 6 Exchq. 314; *Poulton v. London, &c. Ry. Co.*, L. R. 2 Q. B. 534; *Goff v. Gt. Northern Ry. Co.*, 3 El. & E. 672; *Whitfield v. Southeastern Ry. Co.*, El. Bl. & El. 115. As to the ancient doctrine see *Coulter's case*, 9 W. L. T. Rep. 209.

² *Green v. London Omnibus Co.*, 7 C. B. (N. S.) 290.

³ *Hutchinson v. Western, &c. R. Co.*, 6 Heisk. (Tenn.) 634; *Hanson v. Railroad Co.*, 62 Me. 84; *Denver, &c. R. Co. v. Harris*, 122 U. S. 596; *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314; *Moore v. Fitchburg R. Co.*, 4 Gray Mass.), 465; *Hanson v. European R. Co.*, 62 Me. 84; 16 Am. Rep. 404; *McKinley v. Chicago, &c. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; *Passenger R. Co. v. Young*, 21 Ohio St. 518; 8 Am. Rep. 78.

for libel,¹ for nuisance,² for deceit,³ for malicious prosecution;⁴ it may be indicted for obstructing a highway,⁵ or for neglecting properly to maintain it,⁶ for Sabbath-breaking,⁷ or other offences;⁸ and may be punished for contempt.⁹ It is liable for the violation of

¹ *Philadelphia, &c. R. Co. v. Quigley*, 21 How. (U. S.) 202; *State v. Atchison*, 3 Lea (Tenn.), 729; 31 Am. Rep. 66; *Tench v. Great Western R. Co.*, 32 U. C. Q. B. 452.

² *First Baptist Church v. Schenectady R. Co.*, 5 Barb. (N. Y.) 79; *Baltimore, &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317.

³ *Ranger v. Gt. Western R. Co.*, L. R. 5 H. L. Cas. 72; *Zabriskie v. Cleveland, &c. R. Co.*, 23 How. (U. S.) 381; *Barwick v. Bank, L. R. 2 Exch.* 259.

⁴ *Boogher v. Life Association*, 75 Mo. 319, *overruling Gillett v. Missouri Valley R. Co.*, 55 Mo. 315; *Jordan v. Alabama, &c. R. Co.*, 74 Ala. 85; 49 Am. Rep. 800, *overruling Owsley v. Montgomery, &c. R. Co.*, 37 Ala. 560; *Pennsylvania Co. v. Weddle*, 101 Ind. 138; 26 Am. & Eng. R. Cas. 120; *Morton v. Metropolitan L. Ins. Co.*, 34 Hun (N. Y.) 366; *Williams v. Insurance Co.*, 57 Miss. 759; 34 Am. Rep. 494.

⁵ *Reg. v. Gt. North of England Ry. Co.*, 9 Q. B. 315; *Com. v. New York, &c. R. Co.*, 112 Mass. 412; *State v. Chicago, &c. R. Co.*, 63 Iowa, 508; 17 Am. & Eng. R. Cas. 170; *ante*, § 231. On the trial of such an indictment the defendant may show that the road is in possession of, and being operated by, another company under a valid lease or sale. *State v. Chesapeake, &c. R. Co.*, 24 W. Va. 809; 10 Am. & Eng. R. Cas. 429. Statutes providing for an indictment for the obstruction of a "highway, tramway, or street" do not apply to the obstruction of a private way. *Com. v. Boston, &c. R. Co.*, 135 Mass. 550.

⁶ *Paducah, &c. R. Co. v. Com.*, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; *New York, &c. R. Co. v. State*, 50 N. J. L. 303; 32 Am. & Eng. R. Cas. 186; *Reg. v. Birmingham, &c. R. Co.*, 9 Carr. & P. 469; 38 E. C. L. 187.

⁷ *State v. Baltimore, &c. R. Co.*, 15 W. Va. 362; 36 Am. Rep. 803. The exact extent to which a State may prohibit the

running of trains on Sunday is an unsettled question. There is no doubt of its power in this regard over companies whose lines lie entirely within the State. But where the road extends into another State, it becomes an instrument of interstate commerce and, according to some authorities, is beyond the control of the State in so far as the actual prohibition of the running of trains is concerned. And this, it is believed, is the view which must prevail when the question is finally settled. The Virginia statute was as mild a one as could have been framed, — it excepted from its operation all passenger and mail trains, and all trains loaded with cattle or with perishable freight. But the Supreme Court of Appeals held that it was unconstitutional in that it was an invasion upon the exclusive power of Congress. *Norfolk, &c. R. Co. v. Commonwealth*, 88 Va. 95; 47 Am. & Eng. R. Cas. 1. As a matter of fact the statute prior to this decision had been evaded by various schemes, as by attaching a single car of perishable freight to a train of coal cars, and similar expedients. In West Virginia a similar statute was upheld. *State v. Baltimore, &c. R. Co.*, 24 W. Va. 783; 18 Am. & Eng. R. Cas. 466. In both of these cases the question is discussed *pro* and *con*, and the searcher is referred to them for all the learning on the subject.

⁸ As to indictment see *post*, § 337; 4 Am. & Eng. Ency. Law, p. 267; 19 id. 926. See also *Texas, &c. R. Co. v. State*, 41 Ark. 488; 20 Am. & Eng. R. Cas. 626.

⁹ *People v. Albany, &c. R. Co.*, 12 Abb. Pr. (N. Y.) 171. In this case the railroad company had been enjoined from taking up or removing its road, or from otherwise disposing of the iron forming the track. It was held that the company's omission to interpose to prevent third persons from removing the iron of the track, which it had sold to them before the injunction was issued, did not constitute a contempt. See in this connection, *United States v. Memphis, &c. R. Co.*, 6 Fed. Rep. 237.

a patent right.¹ So it is liable for false imprisonment. Thus, in a New York case,² the plaintiff, who had entered one of the defendant's cars at Forty-Second street, New York city, while attempting to pass out of the station at Rector street was stopped by the gateman, who demanded his ticket. Upon being told by the plaintiff that he had purchased a ticket but had lost it, the gateman detained him, and finally sent for a policeman, who arrested him on the charge of disorderly conduct and refusing to pay his fare, and took him to the station-house where he was detained over night. On the next morning he was examined before a police justice and discharged. The defendant had instructed its gatemen to compel passengers to produce their tickets on leaving its stations. It was held that defendant was liable for false imprisonment.

It seems to be now generally well established that railway companies and all other corporations are liable civilly to the same extent to which an individual is for all classes of torts committed in the prosecution of their business,³ and railroad companies, in view of the high and special duty to passengers which is imposed upon them by law are liable for all the acts of their servants whether wilful or not, and whether committed within the apparent scope of their authority or not.⁴

The doctrine of *ultra vires* has no application in this connection, and the fact that the act complained of was beyond the charter powers of the corporation can afford no defence to an action of tort. For, seeing that the corporation has authority by its charter to do an injury, to allow such a defence would be to confer an unrestricted

¹ National Car Brake Co. v. Lake Shore, &c. R. Co., 4 Fed. Rep. 219; York &c. R. Co. v. Winans, 17 How. (U. S.) 30; Winans v. New York, &c. R. Co., 21 How. (U. S.) 88; Emigh v. Chicago, &c. R. Co., 1 Biss. (U. S.) 400; Winans v. Schenectady, &c. R. Co., 2 Blatchf. (U. S.) 279; Turrill v. Illinois Central R. Co., 3 Biss. (U. S.), 66; Sayles v. Chicago, &c. R. Co., 1 Biss. (U. S.) 400.

² Lynch v. Metropolitan Elevated R. Co., 90 N. Y. 77; 43 Am. Rep. 141. See the same principle sustained in Palmeri v. Manhattan R. Co., 133 N. Y. 261. Compare Poulton v. London, &c. Ry. Co., L. R. 2 Q. B. 534; Mulligan v. New York, &c. R. Co., 129 N. Y. 506; Mali v. Lord, 39 N. Y. 381. The fact that a statute of the State provides that "the conductor of every train shall have all the powers of

a conservator of the peace while in charge of the train" does not relieve the carrier of liability for the false imprisonment of a passenger by the conductor. Gillingham v. Ohio River R. Co., 35 W. Va. 588. But there is no liability where the passenger was arrested for disorderly conduct on the cars, of which charge he was afterwards convicted, when the arrest was made by the proper officers. Oppenheimer v. Manhattan R. Co., 18 N. Y. Supp. 411. See also Cunningham v. Seattle, &c. R. Co., 3 Wash. St. 471.

³ Goodspeed v. East Haddam Bank, 22 Conn. 530. This doctrine is so well established that it is unnecessary to review the few unimportant cases which hold the other way.

⁴ See the subject extensively reviewed, *ante*, § 315.

license to commit injury.¹ Thus, in a New York case,² the defence was that the act complained of was unauthorized and must therefore be considered as the act of the officers of the company and not of the company itself. In denying the validity of such a defence the court went on to say: "This would be a most convenient distinction for corporations to establish; that every violation of their charter, or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to the prejudice of the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."³ The doctrine that a corporation is not liable for a tort, but only the members or agents committing it, is "fallacious in principle and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a railroad company might do great injury by means of its laborers who have no property to answer damages."⁴

The corporation cannot ordinarily be held liable for the wilful or malicious torts of its servants which are committed without the scope of their authority. There is an exception to this rule in the case of injuries committed against passengers;⁵ but in all other cases the corporation cannot be made responsible, unless it can be shown that the injury was committed while the servant or agent was acting within the scope of his employment.⁶

SEC. 334. Liability for Injuries to Real Estate. — We have already seen that railway companies acting within the scope of the powers

¹ *Merchants' Bank v. State Bank*, 10 Wall. (U. S.), 604; *National Bank v. Graham*, 100 U. S. 699; *Hussey v. Norfolk, &c. R. Co.*, 98 N. C. 34; 3 S. E. Rep. 923; *Gruber v. Washington, &c. R. Co.*, 92 N. C. 1. Thus where a railroad company had purchased and was operating a steamboat, the fact that it had no authority by its charter, or the general law, to own and operate a steamboat was no defence to an action for damages by a passenger injured through the negligent operation of the steamer. *Central R. & B. Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353; *Hutchinson v. Western, &c. R. Co.*, 6 Heisk. (Tenn.) 634. Compare *Hood v. New York, &c. R. Co.*, 22 Conn. 502.

² *Life, &c. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. (N. Y.) 31.

³ See also *Goodspeed v. East Haddam Bank*, 22 Conn. 537; *Thayer v. Boston*, 19 Pick. (Mass.) 511; *Philadelphia, &c. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Denver, &c. R. Co. v. Harris*, 122 U. S. 597; *Brokaw v. New Jersey, &c. R. Co.*, 32 N. J. L. 332.

⁴ *Chestnut Hill, &c. Turnpike Co. v. Rutler*, 4 Serg. & R. (Penn.) 16.

⁵ See *ante*, § 315.

⁶ In *Miller v. Burlington, &c. R. Co.*, 8 Neb. 219; *Porter v. Chicago, &c. R. Co.*, 41 Iowa, 348; *Marion v. Chicago, &c. R. Co.*, 59 Iowa, 428.

conferred upon them are not liable for injuries by the taking of real estate for their use, except in the manner provided by statute. But if by an act outside of the scope of their charter-powers, or in excess thereof, they injure adjacent property, they are liable therefor in the same manner, to the same extent, and by the same remedies that an individual would be, and the doctrine of *ultra vires* has no application.¹ The statute remedy does not exclude actions to recover for injuries inflicted by an unwarranted, unlawful, or improper exercise of its functions; and whenever it transcends its powers, or executes them in a manner not warranted by its charter, it is liable for the injurious consequences,²—for an entry upon land outside of its location, to take materials without authority of law or a license from the owner;³ or if it so uses adjoining land for a cart-way,⁴ or obstructs an easement,⁵ or does any other act upon adjacent lands not authorized by its charter, it is liable in trespass therefor.⁶ So too, it is liable, in an action on the case, for consequential injuries to lands outside its location resulting from the improper or negligent exercise of its powers,—as, if it runs engines over its road not provided with suitable spark-protectors, whereby fire is communicated to adjacent lands;⁷ or, if it erects embankments without suitable culverts to carry away the water of a natural stream, whereby the land of super-riparian owners is flooded; or, if it permanently diverts the waters of a natural stream so as to injure a lower mill,⁸ or deals with surface water in a manner not warranted by law, to the injury of adjacent estates;⁹ or erects buildings for the prosecution of a noisy trade, which

¹ Doonan v. Midland Ry. Co., L. R. 2 App. Cas. 792.

² See chap. xii.

³ Parsons v. Howe, 41 Me. 218.

⁴ Sabin v. Vt. Central R. R. Co., 25 Vt. 363.

⁵ Bell v. Midland Ry. Co., 10 C. B. N. s. 287; Proprietors of Locks v. Nashua, &c. R. R., 10 Cush. (Mass.) 385.

⁶ State v. Armell, 8 Kan. 288.

⁷ Illinois Central R. R. Co. v. Mills, 42 Ill. 407; Smith v. Old Colony R. R. Co., 10 R. I. 22; Ill. Central R. R. Co. v. McClelland, 42 Ill. 355; Cook v. Champlain Trans. Co., 1 Den. (N. Y.) 91; St. Louis, &c. R. R. Co. v. Gilham, 39 Ill. 455; Frankford, &c. R. R. Co. v. Philadelphia, &c. R. R. Co., 54 Penn. St. 345; Phila., &c. R. R. Co. v. Yerger, 72 id. 121; Crist v. Erie R. R. Co., 58 N. Y. 638;

Bevier v. Delaware, &c. R. R. Co., 13 Hun (N. Y.), 254; Lackawanna, &c. R. R. Co. v. Doak, 52 Penn. St. 379; Bedell v. L. I. R. R. Co., 44 N. Y. 367; Webb v. Rome, &c. R. R. Co., 47 N. Y. 282.

⁸ See chap. xii.

⁹ Little Rock, &c. R. R. Co. v. Chapman, 39 Ark. 463; Gilham v. Madison Co. R. R. Co., 49 Ill. 484; Raleigh &c. R. R. Co. v. Wicker, 74 N. C. 220. But *contra*, see Cairo, &c. R. R. Co. v. Stevens, 73 Ind. 278; O'Connor v. Fond Du Lac, &c. R. R. Co., 52 Wis. 526. In Whalley v. Lancashire & Yorkshire Ry. Co., 50 L. T. Rep. 472, the defendants were owners of a railway embankment which was built on sloping ground, and so situated that the land on one side of the embankment was on a higher level than that on the other

is not necessary for the construction of its line, as a mortar-mill.¹ So a workshop erected near a church has been held to be a nuisance because it-disturbs worship there.² So the running of its trains

side. Owing to an extraordinary rain-fall, the land on the higher level was flooded, and a quantity of water was collected, which pressed against the railway embankment so as to endanger its safety. Defendants, in order to preserve their embankment, cut openings through it and let the water run out, the result of which was that the plaintiff's land (which was on the opposite side of the railway from where the water was collected, and on a lower level) was flooded and his crops injured. It was held that they were liable in damages.

¹ *Fenwick v. East London Ry. Co.*, L. R. 20 Eq. 544. The evidence tending to show a permanent injury resulting from the construction and operation of the railroad, such injury was effectuated when the road was constructed and first put in operation, and any right of action therefor vested in him who was then the owner of the premises. His grantee cannot maintain such action. *Chicago, &c. R. R. Co. v. Loeb*, 8 Brad. (Ill.) 627. But in order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore it was held that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, although it appeared that he was afterwards unable to let the house except at a lower rent. *Mumford v. Oxford Ry. Co.*, 1 H. & N. 34. Where the injuries sustained consist in the destruction of crops from year to year, the plaintiff will not be limited to a single action, but may sue from time to time as often as the damage occurs. *Dickson v. Chicago, Rock Island & Pacific R. R. Co.*, 74 Mo. 575. The declaration averred that the plaintiff owned and occupied as a residence certain property fronting on a certain street; that the defendant constructed and operated its railroad upon the street, and that smoke and cinders were cast and thrown from the

engines and locomotives in and upon the property of the plaintiff, thereby greatly damaging the same. It was held, on demurrer, that the declaration showed a good cause of action. *Stone v. Fairbury, &c. R. R. Co.*, 68 Ill. 394. Where a railroad company permits a horse, killed by its locomotive, to remain on the side of its track so near a dwelling-house as to render its occupancy unwholesome, it is guilty of a private nuisance, for which it becomes liable to the person in possession of the house. In such case the husband, being the occupier and in rightful possession, is the proper plaintiff, and not the wife, although the sickness resulting from the nuisance is that of the latter. And he may recover damages resulting from that cause, and also from the sickness of any other members of his household. *Ellis v. Kansas City, &c. R. R. Co.*, 63 Mo. 131. Abutting owners injured by a public nuisance to the highway can sue for and recover such special damages as they can prove. *Grand Rapids, &c. R. R. Co. v. Heisel*, 47 Mich. 393. In an action to recover special damages caused by placing an obstruction in the nature of a nuisance in the street opposite the plaintiff's residence, the defendant is liable only for the damages actually sustained prior to the commencement of the action. If the decreased value of the premises could be considered in such case, it would be their decreased market value; and not their decreased value as a family residence; so that evidence of the latter fact is not admissible. *Hopkins v. Western Pacific R. R. Co.*, 50 Cal. 190. If an individual is seriously affected by the exercise of unwarrantable powers by a city council in authorizing a railway upon a street he may invoke the aid of a court of chancery for redress. But this is no concern of the general public. *Chicago &c. R. Co. v. People*, 92 Ill. 170.

² *Baltimore, &c. R. Co. v. Baptist Church*, 108 U. S. 317; 11 Am. & Eng. R. Cas. 15; *First Baptist Church v. Schenectady R. Co.*, 5 Barb. 79.

upon the Sabbath so as to disturb public worship has been held to be an actionable nuisance.¹ But we apprehend that, if trains are run upon the Sabbath by virtue of express statutory authority, it would be questionable whether a recovery could be had in such cases, as there seems to be no principle upon which churches have any superior rights in respect to immunity from noise, etc., than individuals. Indeed, it is liable for damages resulting from any nuisance created by it which is not authorized, either expressly or impliedly, by its charter or the general law.²

In the case of a private injury from an act of a railway company, a person is bound to use reasonable exertions to prevent its increase; and if he stand by and sees the injury going on from day to day without making any efforts to prevent it, where such reasonable efforts would have ameliorated the injury, he cannot recover for the increased injury.³ Nor can he recover where by his own act the injury was brought upon his estate.⁴

SEC. 335. **Equitable Remedies for Nuisances.** — A railway company will be enjoined by a court of equity from maintaining a nuisance either private or public.⁵ In the case of a public nuisance, the remedy may be sought through the intervention of the proper law-officers of the State,⁶ or upon a bill brought by private persons who sustain a special and particular damage, different from that suffered by the public generally.⁷ In order to enable a private person to maintain a bill to restrain a public nuisance maintained by a railway company, he must show that he is specially damaged thereby;⁸ that

¹ Trustees, &c. v. Troy R. R. Co., 5 Barb. (N. Y.) 77; Bellemont, &c. R. R. Co. v. Fifth Baptist Ohurch, United States Sup. Ct. 1883.

² See chap. xii. Sabin v. Vt. Central R. R. Co., 25 Vt. 363; Whitehouse v. Androscoggin R. R. Co., 52 Me. 208.

³ Kansas, &c. R. R. Co. v. Muhlman, 17 Kan. 224; Chase v. New York Central R. R. Co., 24 Barb. (N. Y.) 273.

⁴ Chicago, &c. R. R. Co. v. Hoag, 90 Ill. 339.

⁵ Sparhawk v. Union Pass. R. R. Co., 54 Penn. St. 401; Currier v. West Side Elevated R. R. Co., 6 Blatchf. (U. S. C. C.) 487; Hinchman v. Paterson Horse R. R. Co., 17 N. J. Eq. 75; Brainard v. Conn. River R. R. Co., 7 Cush. (Mass.) 506; Milhan v. Sharp, 27 N. Y. 611; Hartshorn v. South Reading, 3 Allen

(Mass.), 501; Davis v. New York, 14 N. Y. 506; People v. Sturtevant, 9 N. Y. 263; District Attorney v. Lynn, &c. R. R. Co., 16 Gray (Mass.), 242; Wetmore v. Story, 22 Barb. (N. Y.) 414. Equity will not enjoin a nuisance of a merely temporary character. Swain v. Gt. Northern Ry. Co., 4 De G. J. & S. 211. A lessee of a railway is equally liable with the lessor for a nuisance arising from the manner in which the road is constructed. Tate v. Missouri, &c. R. R. Co., 64 Mo. 149.

Where several companies occupy the same railway they are jointly liable for a nuisance to which each contributes. Chicago, &c. R. R. Co. v. Hall, 90 Ill. 42.

⁶ Id.

⁷ Wood on Nuisances, chapters xix. and xxv.

⁸ Sparhawk v. Union Pass. R. R. Co.,

is; that he sustains a special damage therefrom not common to the public. By common injury is meant an injury of the same kind and character, and such as naturally and necessarily arises from a given cause, but not necessarily similar in degree, or equal in amount.¹ If the injury is the same in kind to all, it is a common injury although one may actually be injured or damaged more than another. To illustrate, we will take the case of a slaughter-house erected upon a public street. To all who come within the sphere of its operation or effects, it is a nuisance, and offends the senses by its noxious smells. It is a common nuisance in such a locality, and in its general effects produces a common injury. But to those living upon the street and within its immediate sphere, it is both a common and a private nuisance. Common in its general effects, but private in its special effects upon those living there.² To the public generally it produces no injury except such as is common to all; but to those owning property in its neighborhood, or residing there, it produces a special injury, in that it detracts from the enjoyment of their habitations, produces intolerable physical discomfort, and diminishes the value of their premises for the purposes to which they have been devoted.³ Therefore, while those residing beyond its sphere and owning no property there that is impaired in value, cannot have a private remedy, either at law or in equity, yet those who live in the neighborhood, or who own property there that is impaired in value by reason of the nuisance, *may* have their private actions to recover their special damage, or protect their special interests.⁴ The degree of damages which each sustains varies according to the ratio of nearness to, or distance from, the promoting cause.

It may be said that the real distinction fairly deducible from all the cases entitled to any consideration as authorities is this: When the wrongful act is of itself a disturbance or obstruction to the exercise of a public or common right, and nowise inflicts any special

54 Penn. St. 401; *Bell v. Ohio, &c. R. Co.*, 25 Penn. St. 161; *Northern Pacific R. Co. v. Barnesville, &c. R. Co.*, 4 Fed Rep. 172.

¹ *Shaubut v. St. Paul, &c. R. R. Co.*, 21 Minn. 502.

² *Soltau v. De Held*, 9 Eng. Law & Eq. 102; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95.

³ *Ross v. Butler*, 19 N. J. Eq. 294; *Davidson v. Isham*, 9 id. 189; *Wolcott v. Melick*, 11 id. 207.

⁴ *Little Rock, &c. R. R. Co. v. Brooks*, 39 Ark. 403; *Cain v. Chicago, &c. R. R. Co.*, 54 Iowa, 255; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Soltau v. De Held*, 9 Eng. Law & Eq. 102; *Rex v. Dewsnap*, 16 East, 194; *Payne v. McKinley*, 54 Cal. 532; *Nottingham v. Baltimore, &c. R. R. Co.*, 3 MacArthur (D. C.), 517.

damage upon one more than another, the sole remedy is by indictment, unless special damage has actually been sustained by individuals, as in the case of negligently keeping large quantities of gunpowder on a public street or highway;¹ carrying on a noxious trade on a public highway, but away from human habitations or places of business;² keeping a bawdy house; indecent or immoral practices, and many other nuisances that generally are of a purely public character. Injuries of this class are usually public in their effects, but conditions may exist that make them private also. In the case of a negligent keeping of gunpowder, if a person owns property in the vicinity, and by reason of the fear and apprehension of danger, his tenants leave his buildings and he thus loses the rent therefrom, this is a special injury to him, apart from that suffered in common with the rest of the public; and he is entitled to his private action, both to recover the damages, and abate the nuisance, and this even though there are many others similarly situated and affected.³ So, too, in the case of a noxious trade upon a highway, but away from habitations, so long as every person sustains a common injury only therefrom, as by being annoyed by its offensive and unwholesome smells, it is a purely public injury; but if its effects extend to the dwellings or places of business of any persons, to such an extent as to render their occupancy materially uncomfortable, then it becomes a private nuisance to those whose dwellings or places of business are so affected, and they may have their action therefor, although there are many persons who are thus affected, and the result will be to promote a multitude of suits.⁴ Of course, if

¹ *The People v. Sands*, 1 Johns. (N. Y.) 78.

² *Rex v. Niel*, 2 C. & P. 485; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Catlin v. Valentine*, 9 Paige (N. Y.), 575; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Story v. Hammond*, 4 Ohio, 376; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Adams v. Michael*, 38 Md. 126; *Rex v. Dewsnap*, 16 East, 194; *Grabill v. R. R. Co.*, 50 Ill. 241; *Gas Co. v. Thompson*, 39 id. 598.

³ *Weir v. Kirk*, 74 Penn. St. 230; *Cheatham v. Shearon*, 1 Swan (Tenn.), 213; *Myers v. Malcolm*, 6 Hill (N. Y.), 292.

⁴ *Knight v. Gardner*, 19 Law Times (N. S.) 673; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Crump v. Lambert*, L. R. 3 Eq. 409; *Lansing v. Smith*, 4 Wend. (N. Y.)

10; *Francis v. Schoelkopf*, 53 N. Y. 152; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Ross v. Butler*, 19 N. J. Eq. 294; *Ottawa Gas-light Co. v. Thompson*, 39 Ill. 598; *Tipping v. St. Helen Smelting Co.*, E. C. L. 608; *Story v. Hammond*, 4 Ham. (Ohio) 376; *Wood on Nuisances*, 736, 738; *Harvard College v. Stearns*, 13 Gray (Mass.), 1; *Hatch v. Vt. Central R. R. Co.*, 28 Vt. 142; *Sparhawk v. Union, &c. R. R. Co.*, 54 Penn. St. 401; *Milbau v. Sharp*, 27 N. Y. 611; *Kellinger v. Forty-Second Street R. R. Co.*, 50 id. 206; *Eaton v. Boston, &c. R. R. Co.*, 51 N. H. 504; *Lamphier v. Boston, &c. R. R. Co.*, 33 N. H. 495; *Welland v. Cambridge*, 3 Allen (Mass.), 574; *Haskell v. New Bedford*, 108 Mass. 208; *Buck v. Conn. & Pass. River R. R.*

the party has an adequate remedy at law, a court of equity will not interfere.¹

If a remedy is sought through the intervention of the public authorities, reasonable diligence must be exercised in seeking the remedy, or the court will refuse to interfere, on account of the *laches* of the parties interested.² But the remedy by indictment is always open to the public, as the statute of limitations never bars a public nuisance.³ Acts authorized by law are never indictable as nuisances; consequently, in all cases, the question as to whether an act of a railway company is or is not a nuisance, depends upon the circumstance whether it is authorized or not.⁴ As to the effect of legislative authority upon private rights, we have already seen that such authority is not always a protection.⁵ Where the nuisance was created by another company, and is only continued by the company in possession, either notice or knowledge of the nuisance must be brought home to it, before an action can be brought against it therefor.⁶ But the company creating the nuisance is not entitled to notice.⁷ While, as previously stated, there is no prescription for a public nuisance,⁸ yet the statute does run against a purely private nuisance.⁹

Co., 42 Vt. 370; *Houck v. Wachter*, 34 Md. 265; *Hughes v. Providence, &c. R. R. Co.*, 2 R. I. 493; *Wabash, &c. Canal Co. v. Spears*, 16 Ind. 441; *Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 235; *Chicago, &c. R. R. Co. v. Moffatt*, 75 Ill. 524; *Parratt v. Cincinnati, &c. R. R. Co.*, 3 Ohio St. 330; *South Carolina R. R. Co. v. Moore*, 28 Ga. 398; *Penn. &c. R. R. Co. v. Graham*, 63 Penn. St. 230.

¹ *Hodgkinson v. Long Island R. R. Co.*, 4 Edw. Ch. (N. Y.) 411; *Attorney-General v. N. J., &c. R. R. Co.*, 3 N. J. Eq. 136; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Morris, &c. R. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Hudson, &c. R. R. Co. v. New York, &c. R. R. Co.*, 9 Paige, Ch. (N. Y.) 323.

² *Hentz v. Long Island R. R. Co.*, 13 Barb. (N. Y.) 646; *Attorney-General v. New York, &c. R. R. Co.*, 24 N. J. Eq. 49.

³ *Cain v. Chicago, &c. R. R. Co.*, 54 Iowa, 255; *State v. Louisville, &c. R. R. Co.*, 86 Ind. 114.

⁴ *Rundle v. Pacific R. R. Co.*, 65 Mo. 325; *Hodgkinson v. Long Island R. R. Co.*, 4 Edw. Ch. (N. Y.) 411; *Baxter v. Spuyten Duyvil, &c. R. R. Co.*, 61 Barb.

(N. Y.) 428; *Bordentown, &c. T. Co.*, 20 N. J. L. 314; *Attorney-General v. New York, &c. R. R. Co.*, 24 N. J. Eq. 49; *Thompson v. Androscoggin R. R. Co.*, 54 N. H. 545; *Danville, &c. R. R. Co. v. Com.*, 78 Penn. St. 29; *People v. Detroit, &c. Plank Road Co.*, 37 Mich. 195.

⁵ See ch. xii.

⁶ *Wayland v. St. Louis, &c. R. R. Co.*, 75 Mo. 548; *Dickson v. Chicago, &c. R. R. Co.*, 71 Mo. 575; *Brown v. Cayuga, &c. R. R. Co.*, 12 N. Y. 486; *Conhocton Stone Road v. Buffalo, &c. R. R. Co.*, 51 N. Y. 573. In some of the cases a request to abate is held necessary. *Nichols v. Boston*, 98 Mass. 39; *West v. Louisville, &c. R. R. Co.*, 8 Bush (Ky.), 404; *McDonough v. Gilman*, 3 Allen (Mass.), 264.

⁷ *Chicago, &c. R. R. Co. v. Moffatt*, *ante*.

⁸ *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Regina v. Brewster*, 8 U. C. C. B. 208; *Rhodes v. Whitehead*, 27 Tex. 304; *Taylor v. People*, 6 Parker's Cr. (N. Y.) 347; *Elkins v. State*, 2 Humph. (Tenn.) 543; *People v. Cunningham*, 1 Den. (N. Y.) 524; *Wood on Nuisances*, 791-2.

⁹ *Powers v. Council Bluffs*, 45 Iowa, 652; *Wood on Limitations*, 371.

SEC. 336. Liability for Breach of Public Duty.—Where a railway omits or negligently performs a public duty, as, where it neglects to keep its rails in proper condition at a highway-crossing,¹ or to keep its road in proper repair at such points, it is not only liable to indictment as for a public nuisance, but is also liable for damages resulting therefrom to any traveller who is injured thereby.² So, too, it is held to amount to an indictable nuisance for a railway company to run its trains at a high rate of speed without giving the statutory signals over highway-crossings,—as, in one case, at the rate of from fifteen to twenty miles an hour.³ But this rule can only be sup-

¹ In *Paducah, &c. R. R. Co. v. Com.*, 80 Ky. 147, the rails at a highway-crossing stood six or eight inches above the surface of the highway, and were held an indictable nuisance.

² *Penn. &c. R. R. Co. v. Graham*, 63 Penn. St. 290. A railroad track in a street is not necessarily, *per se*, a public nuisance. Nor can it be said, as a matter of law, that it is an obstruction. *Wabash, St. Louis & Pacific R. R. Co. v. The People*, 12 Brad. (Ill.) 448. See also *State v. Louisville, New Albany, & Chicago R. R. Co.*, 86 Ind. 114. But where a railway company laid a side track upon the street of a city within six feet of the line of the street, *in violation of the provisions of the city ordinance granting it the right of way*, which prohibited the construction of any track within eighteen feet of such line, it was held that such track and the use thereof constituted a nuisance, for the maintenance of which a property-holder who had sustained special damages by reason thereof might maintain an action, the discretion necessary to be exercised in determining the limits to be imposed upon the use of the street by the railroad being vested in the city council. The track being a side track, and having been wrongfully constructed in violation of the city ordinance, could not be considered a permanent structure, the damages arising from the maintenance of which would be original and not continuous; nor, being a nuisance, could the right to continue such maintenance be acquired by prescription. *Cain v. Chicago, &c. R. R. Co.*, 54 Iowa, 255. *Denver & Swansea R. R. Co. v. Denver City R. R. Co.*, 2 Col. 673. An improper and unreasonable

exercise of a right to use a street by a railway company may become a nuisance. *State v. Louisville, New Albany, & Chicago R. R. Co.*, 86 Ind. 114. *North Chicago City R. R. Co. v. Lake View*, 105 Ill. 207. Where a railroad is built in a public street, the escape of soot, smoke and smells from the locomotives, the obstruction of the street with cars, the jarring of the earth and neighboring buildings by passing trains, to the inconvenience, discomfort, and danger of adjoining proprietors, do not in law constitute a nuisance, if the charter of the company authorizes the laying of the track, unless the road is negligently or unskilfully built or operated. *Randle v. Pacific R. R. Co.*, 65 Mo. 325.

³ *Louisville, &c. R. R. Co. v. Com.*, 80 Ky. 143; 44 Am. Rep. 468. It must be remembered, however, that a railway company is not liable to indictment for a proper use of streets or highways within the scope of the powers conferred upon it. Thus, where it is authorized to construct tracks, switches, &c., in a street or highway, it cannot be charged with a public nuisance where the obstruction is no greater than is required by a reasonable use. *State v. Louisville, &c. R. R. Co.*, 86 Ind. 114; *Wabash, &c. R. R. Co. v. People*, 12 Ill. App. 448. And the conviction in *Louisville, &c. R. R. Co. v. Com.*, *ante*, can only be sustained upon the ground that the company exercised its right unlawfully, by habitually neglecting to ring the bell or blow the whistle as its trains approached the crossing. In the absence of any statute regulating the matter, a railway company, conforming to the statute requirements as

ported where the statute expressly restricts the rate of speed at such points, or where the company, as in the case last cited, habitually fails to give the statutory signals. So, too, a railway company is liable to indictment if it unreasonably obstructs a highway, either by its trains, or by leaving objects thereon or near thereto—as a hand car—which are calculated to frighten horses,¹ and it is liable civilly for all the damages that ensue therefrom. Thus, in a Massachusetts case,² the company had a derrick located upon their premises, the boom of which swung over the highway, and the plaintiff's horses became frightened at it, and became unmanageable and ran away, doing considerable damage to the plaintiff. The company was held responsible therefor.³ So, if a railway company erects a bridge across a navigable stream so as unreasonably to obstruct navigation, or without authority, it is liable to any person whose boats are thereby obstructed, for all the ensuing damages.⁴ And generally, if these companies do any acts in a public street or highway which are detrimental to the public, without authority, or if with authority, if they exercise the powers conferred in an improper or negligent manner, they are liable to indictment so far as the rights of the general public are infringed, and to a civil action in favor of any individual who is specially injured thereby.⁵

SEC. 337. Liability to Indictment Generally.—As a rule, at the common law, a corporation is not liable to indictment for misfeasances, except in the case of nuisances, but in many of the States the statute provides for their indictment, for certain acts either of omission or commission, and their punishment by fine; and inasmuch

to signals, may cross a highway at any rate of speed it pleases.

¹ *Cincinnati, &c. R. R. Co. v. Com.*, 80 Ky. 137. Or for any public nuisance. *Northern Central R. R. Co. v. Com.*, 90 Penn. St. 300. And foreign corporations are liable for a violation of the laws of any State in which they operate a railway. *Cincinnati, &c. R. R. Co. v. Com.*, 80 Ky. 137.

² *Jones v. Fitchburg R. R. Co.*, 107 Mass. 261.

³ See the following cases upon the question of liability for accidents resulting from placing objects near highways calculated to frighten horses. *Hardy v. Keene*, 52 N. H. 370. A pile of stones was held a nuisance. *Clinton v. Howard*, 42 Conn. 295.

A steam-engine on wheels passing along a highway is not. *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522. But *contra*, see *Smith v. Stokes*, 4 B. & S. 84; *Harrison v. Leaper*, 5 L. T. (N. S.) 640. See also *Favor v. Boston, &c. R. R. Co.*, 114 Mass. 350. See *Knight v. Good-year Rubber Co.*, 38 Conn. 438, where a steam-whistle on mill near highway was held a nuisance. In *Young v. New Haven*, 39 Conn. 435, steam-roller left beside highway. See also, *Watkins v. Redden*, 2 F. & F. 629, in which a traction steam-engine in highway was held a nuisance.

⁴ *Little Rock, &c., R. R. Co. v. Brooks*, 39 Ark. 403.

⁵ *Wood on Nuisances*.

as a corporation must necessarily act by agents, it is chargeable for their acts done within the scope of their duties.¹ Thus, it has been held that a railway company is liable to indictment for a violation of the laws relating to the Sabbath, by running its trains upon that day;² and generally, it may be said that a corporation is liable criminally for the acts of its agents, when the acts done are within the scope of the authority delegated to the agent. Thus, where the servants or agents of a corporation, in the operation of its works pollute the waters of a stream,³ or obstruct a highway,⁴ or commit any nuisance that is a legitimate result of doing that which they were employed to do, the corporation, as well as the servants or agents, are liable to indictment therefor.⁵ So, a corporation may be indicted for an assault committed by its servants,⁶ or a libel published by its orders,⁷ or for any non-feasance, by the omission by its servants to perform a duty imposed upon it by statute or by the common law,⁸ or for a misfeasance, by doing that which they are intrusted to do, contrary to statute, or in violation of the common law.⁹ Thus, a turnpike company is liable to indictment for permitting its turnpike to be and remain out of order.¹⁰ So, a railroad company authorized to obstruct a highway in a certain mode is liable to indictment for obstructing it in any other mode.¹¹ And, generally, when the act done is made an offence by statute or the common law, and is within the scope of the powers conferred upon its officer, agent, or servant doing it, and is punishable by fine, the corporation is criminally liable therefor.

SEC. 338. Who may sue. — In the case of injury to real estate, all persons having an interest therein may have their remedy. If the estate is in the possession of a tenant, he is entitled to damages for

¹ *State v. Vt. Central R. R. Co.*, 27 Vt. 103; *Boston, &c. R. R. Co. v. State*, 32 N. H. 215; *Com. v. New Bedford Bridge*, 2 Gray (Mass.), 339; *State v. Baltimore, &c. R. R. Co.*, 15 W. Va. 362; *Delaware, &c. Canal Co. v. Com.*, 60 Penn. St. 367.

² *Baltimore, &c. R. R. Co. v. State*, 15 W. Va. 362.

³ *Rex v. Medley*, 6 C. & P. 437; *Regina v. Stephens*, L. R. 1 Q. B. 701.

⁴ *Louisville, &c. R. R. Co. v. State*, 3 Head (Tenn.), 523; *State v. Morris & Essex R. R. Co.*, 23 N. J. 360.

⁵ *Rex v. Medley*, 6 C. & P. 437; *Regina v. Stephens*, L. R. 1 Q. B. 701.

⁶ *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314.

⁷ *Whitfield v. S. E. Railway Co.*, E. B. & E. 115.

⁸ *Regina v. Birmingham Ry. Co.*, 9 C. & P. 469; *Com. v. Nashua & Lowell R. R. Co.*, 2 Gray (Mass.), 54; *Regina v. G. N. of England Ry. Co.*, 9 Q. B. 315.

⁹ *State v. Vt. Central R. R. Co.*, 27 Vt. 103; *Regina v. North of England Ry. Co.*, 9 Q. B. 315; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339.

¹⁰ *Red River Turnpike Co. v. State*, 1 Sneed (Tenn.), 474; *Waterford, &c. Turnpike Co. v. People*, 9 Barb. (N. Y.) 161.

¹¹ *Regina v. Scott*, 3 Q. B. 543.

the injury to his estate, and if the injury is of a permanent nature, the reversioner is also entitled to damages.¹ For injury inflicted upon real estate, the person owning the estate at the time when it was inflicted, is the only one entitled to sue,² except in the case of a vendee in possession under a contract to purchase.³

SEC. 339. Legislative Authority restricted. — Where an act is authorized by an act of the legislature to be done that would be a nuisance except for such authority, the grant is taken subject to the restriction that the highest degree of care will be exercised that the act so authorized shall not operate as an injury to the public or to individuals. Therefore a railroad company authorized to use steam-engines upon its road is bound to use those that are provided with the latest and best improvements to prevent the escape of sparks from its smoke-stack, or of fire and coals from its fire-box; and if it makes use of engines defective in these respects, when the defect might be remedied, or when, by the use of a different class of engines, the danger might be avoided, the engines will be treated as nuisances, and the company is liable for all the damages that result from their use.⁴

SEC. 340. Railroad Grants must be exercised in Conformity to Charter. — So, too, where a railroad company is authorized by its charter to lay its tracks in a certain locality, if it lays them in another, the road becomes a nuisance upon every highway that it crosses.⁵

¹ *Cain v. Chicago, &c. R. Co.*, 54 Iowa, 255; *Hallgan v. Chicago, &c. R. Co.*, 15 Ill. 558; *Bell v. Midland Ry. Co.*, 10 C. B. n. s. 287; *Indianapolis, &c. R. Co. v. McLaughlin*, 77 Ill. 275; *Bannon v. Mitchell*, 6 Brad. (Ill.) 17; *Mumford v. Oxford, &c. Ry. Co.*, 1 H. & N. 34; *Illinois Central R. R. Co. v. Grapple*, 46 Ill. 445.

² *Harrington v. St. Paul, &c. R. R. Co.*, 17 Minn. 215; *Illinois Central R. R. Co. v. Allen*, 39 Ill. 205.

³ *Miller v. Long Island R. R. Co.*, 9 Hun (N. Y.), 194; *Hays v. Miller*, 6 id. 320; *Rood v. N. Y. Central R. R. Co.*, 18 Barb. (N. Y.) 80.

⁴ *King v. Morris & Essex R. R. Co.*, 18 N. J. Eq. 397; *R. R. Co. v. Wood*, 48 Ga. 565; *Potter v. Bonner*, 29 Ohio St. 150; *Reg. v. Telegraph Co.*, 9 Cox's C. C. 174; *Veazie v. R. R. Co.*, 49 Me. 119; *State v. R. R. Co.*, 25 N. J. L. 437; *Com.*

v. R. R. Co., 27 Penn. St. 339; *Hughes v. R. R. Co.*, 2 R. I. 493.

⁵ In *Commonwealth v. Nashua & Lowell R. R. Co.*, 2 Gray (Mass.), 54, it was held that the construction of a railroad across a highway in a manner different from that provided by law is a nuisance, and renders the company liable to indictment therefor, and its charter is no protection against the indictment. Also see *Com. v. Vt. & Mass. R. R. Co.*, 4 Gray (Mass.), 22. *Hughes v. Providence & Worcester R. R. Co.*, 2 R. I. 493; *Regina v. United Kingdom Tel. Co.*, 3 Fost. & F. 73; *Attorney-General v. Ely*, L. R. 6 Eq. 106; *Moshier v. R. R. Co.*, 8 Barb. (N. Y. S. C.) 427; *Denver, &c. R. R. Co. v. Denver City R. R. Co.*, 2 Col. T. 673. And if a railroad is attempted to be laid in a highway without legislative authority, equity will enjoin it without waiting for a trial at law. *Attorney-Gen-*

So, too, where a railroad is laid along-side a highway, the company is bound to use the road in such a manner as is least calculated to interfere with the safety of public travel over the highway, and if it allows the steam-whistle to be blown unnecessarily, whereby horses upon the highway are frightened and injury results, the company is liable for the damages that result therefrom; or if it runs its trains over road-crossings without taking proper measures to signal their approach to travellers upon the highway, it is answerable for all the consequences that flow from the lack on their part to exercise that high degree of care that is essential for the safety of the public, and is commensurate with the hazard which their business creates.¹

SEC. 341. Restrictions upon Railroads.—The rule imposed upon railroad companies in their use of highways for the purposes of their road virtually is, that they shall so run their trains as not to render the highway less safe than it was before the construction of their road over it, so far as reasonable care and diligence on their part can prevent it. The company is bound to take every reasonable precaution to notify the public of the approach of its trains, and to regulate their speed to a rate that is consistent with the safety of the travelling public in the exercise of ordinary care. There can be no question but that if a railroad company habitually neglects to perform these duties to the public, and to exercise reasonable care in the running of its trains along or across a highway, it becomes and may be indicted as a public nuisance. The grant of the extraordinary franchise with which it is invested is upon the implied understanding that it shall exercise the rights conferred for the benefit not to the detriment of the public, and that it shall adopt all possible measures, not only in the kind of machinery employed, but also

ral v. Lombard, &c. Pass. R. R. Co., 10 Phila. (Penn.) 352.

¹ *Lafayette, &c. R. R. Co. v. Adams*, 26 Ind. 76. In *Toledo R. R. Co. v. Goddard*, 25 Ind. 185, it was held that when the engineer of a train has rung the bell and sounded the steam-whistle, and reduced the speed of the train to a proper rate, upon approaching a crossing, he has done all that the law requires, and has fully complied with all the requirements imposed by the exercise of reasonable and ordinary care. A person travelling upon a highway, upon approaching a railroad-crossing, has

a right, if the bell is not rung or the steam-whistle sounded, to presume that the track is clear; and if he is himself in the exercise of ordinary care, the company is liable for all injuries that result to him by reason of a train being run over the crossing without these signals being given. *Philadelphia R. R. Co. v. Hagan*, 47 Penn. St. 244; *Chicago, &c. R. R. Co. v. Gretzner*, 46 Ill. 75; *Warner v. N. Y. Central R. R. Co.*, 45 Barb. (N. Y. S. C.) 299; *North Penn. R. R. Co. v. Heileman*, 49 Penn. St. 60; *Chicago & Rock Island R. R. Co. v. Still*, 19 Ill. 499.

in the running of it, to prevent the infliction of unnecessary injury upon the public or upon private rights.¹

SEC. 342. Restrictions upon all Legislative Grants.—The same rule applies to any other class of acts that may become nuisances by their improper exercise. Thus legislative authority to erect a bridge or dam across a navigable stream cannot be construed as authorizing the person or corporation to make an erection that will materially interfere with the navigation of the river, or increase its hazards. All such rights must be exercised so as not to destroy either public or private rights; and unless they can be, or unless full compensation has been provided for the rights destroyed, the grant will not protect the person or corporation from suits in behalf of persons whose rights are injured, or prosecution by the public, for the injury to the public right, as to all its exercise beyond the reasonable scope of the grant. In other words, the acts create a nuisance.²

SEC. 343. Private Ways.—In reference to private ways in a city or elsewhere, the rule, which is equally applicable to railway companies, seems to be that where a land-owner has given permission to strangers, *express or implied*, to use a private way or path leading

¹ *Regina v. Sharpe*, 3 Railway Cas. 33; *Regina v. Eastern Counties Ry. Co.*, id. 22; *Clarence Ry. Co. v. Great North of England, &c. R. R. Co.*, 13 M. & W. 706; *Bordentown & So. Amboy Turnpike Co. v. Camden & Amboy R. R. Co.*, 17 N. J. L. 314; *Moshier v. Railroad Co.*, 8 Barb. (N. Y.) 427; *Drake v. Hudson River R. R. Co.*, 7 id. 508. In this case it was held that a railroad in the streets of a city is not *per se* a nuisance, and that it will not become one, provided the passage over the street is left free and unobstructed. *King v. Morris, &c. R. R. Co.*, 18 N. J. Eq. 397.

² *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black (U. S. S. C.), 485; *Hart v. The Mayor*, 9 Wend. (N. Y.) 571; *Lansing v. Smith*, 15 id. 133; *Rex v. Russell*, 6 B. & C. 566; *Williams v. Wilcox*, 8 Ad. & El. 314; *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S. S. C.) 91; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (U. S. S. C.) 518. A bridge across a navigable stream is not necessarily to be enjoined as a nuisance; whether it partakes of that character depends upon circumstances, — upon the ex-

tent to which it interferes with navigation and the relative importance of the traffic accommodated and interrupted by it. But the fact that a bridge is a great public benefit will not prevent its being a nuisance if it obstructs navigation. *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. Law Reg. 79; *Mississippi & Missouri R. R. Co. v. Ward, supra*. Any obstruction to the navigation of a public navigable river is, upon established principles, a public nuisance. *U. S. v. New Bedford Bridge Co.*, 1 Woodb. & M. (U. S.) 401; *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S. S. C.) 91. A pier erected in navigable waters according to established regulations is not to be deemed a nuisance unless an actual obstruction to navigation be proved. *Dutton v. Strong*, 1 Black (U. S. S. C.) 23. The erection of a bridge over a navigable stream by authority of the State may prevent the bridge from being a public nuisance, but it is a private nuisance if it obstructs navigation, and persons injured may have their actions therefor. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (U. S.) 518.

across his land, or if he permits a particular pathway to be used as an approach to his dwelling or place of business, he is not justified in doing anything that will endanger the safety of persons passing over the way, without giving them proper notice of what has been done, or revoking the license or permission to come upon the land. Neither can he authorize any other person to do any act that will lessen the safety of those travelling over the way. If he desires to make any excavations, or do anything in or adjoining the way that endangers its use, he must 'close it up.'¹ Every occupant of a house or place of business who makes, or permits the use of a particular way to his house or store over his own grounds, is regarded as fairly holding out invitations to people having occasion to come to his place for any reasonable purpose, to pass over the path; and he is liable for defects therein, or for neglect to establish proper guards around dangerous places, and is held to the same degree of liability as a person who invites people to his store or place of business.² But if a person leaves the usual approaches to a house or place of business and strays upon a part of the ground where there is no path, and sustains injury from falling into excavations or unguarded wells, no liability therefor attaches to the owner of the path or any one else.³ Where a person gives another permission to cross his grounds by either of a number of paths, and the person so giving permission has dug a hole which he usually keeps covered, if he leaves the hole uncovered at night without the knowledge of the person so passing over his ground by permission, and in consequence he falls into the hole and is injured, the owner or occupant is liable therefor; but if the hole had never been covered the person would be remediless. The rule is, that a person who uses a private way accepts all the risks and liabilities that are fairly incident thereto, but has a right to expect that no changes in the condition of the way will be made that will endanger his safety in passing over it.⁴ Where a railway company erected houses for its workmen in such a locality that they were obliged to cross the track to get to their abodes, and a boarder of one of the workmen, upon a dark night, in going

¹ *Corby v. Hill*, 27 L. J. C. P. 320; *Hodgman v. West Midland Railway Company*, 33 L. J. Q. B. 233; *Gallagher v. Humphrey*, 10 W. R. 64; *Gibbs v. Trustees of Liverpool Docks*, 27 L. J. Exch. 321.

² *Lancaster Coal Co. v. Parnaby*, 11 Ad. & E. 243; *Indermaur v. Dames*, L. R. 1

C. P. 274; *Jarvis v. Dean*, 11 Moore, 354; *Barnes v. Ward*, 9 C. B. 420.

³ *Bolch v. Smith*, 31 L. J. Exch. 203.

⁴ *Rolle's Abr.* 88; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Hardcastle v. So. Yorkshire Ry. Co.*, 4 H. & N. 74; *Blyth v. Topham*, Cro. Jac. 158; *Stone v. Jackson*, 16 C. B. 204.

from the house down the track was struck and injured by a locomotive tender, which showed no light and made no noise,—it was held that he might recover.¹

A railroad company is not liable to one who falls into an excavation made in its right of way a number of feet from a public highway, while travelling along a permissive way which had been used to some extent by the public.² In an Ohio case,³ it is said that the law recognizes the right of the owner of real property to the exclusive use and enjoyment of the same, without liability to others for injuries occasioned by its unsafe condition, when the person receiving the injury was not in or near the place of danger by lawful right, and where such owner assumed no responsibility for his safety by inviting him there without giving him notice of the existence or imminence of the peril to be avoided. In such cases the maxim *sic utere tuo ut alienum non lædas* is in no sense infringed. Where no right has been invaded, although one may have injured another, no liability has been incurred.⁴ But where it expressly or impliedly invites a person upon its premises, it is liable to him for injuries resulting to him either from the defective condition of its premises, or from the improper management of its trains.⁵ Where persons go upon its premises to do business with the company, either to its offices, freight houses, etc., it is held to be under a special duty to them; as there is in such cases both an implied invitation and a license. Thus, persons who have business at its freight-houses;⁶ passengers there either to take the train or arriving there by one of its trains,⁷ or persons there as escorts to passengers either to take a train or expected to arrive upon one;⁸ hackmen who carry passengers to and

¹ *McDermott v. N. Y. Central R. R. Co.*, 28 Hun (N. Y.), 325.

² *Bush v. Brainard*, 1 Cow. (N. Y.) 78; *Howland v. Vincent*, 10 Met. (Mass.) 371.

³ *Pittsburgh, &c. R. R. Co. v. Birmingham*, 39 Ohio St. 364.

⁴ *Omaha, &c. R. R. Co. v. Martin*, 14 Neb. 295.

⁵ *Nickerson v. Tirrell*, 126 Mass. 545; *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *Tabin v. Portland, &c. R. R. Co.*, 59 Me. 183; *Pittsburgh, &c. R. R. Co. v. Birmingham, ante*; *Quimby v. Boston, &c. R. R. Co.*, 69 Me. 340.

⁶ *Illinois Central R. R. Co. v. Hoffman*, 67 Ill. 287; *Toledo, &c. R. R. Co. v. Grush*, 67 Ill. 262; *Stinson v. N. Y. Central*

R. R. Co., 32 N. Y. 333; *Newson v. N. Y. Central R. R. Co.*, 29 N. Y. 383; *Boston v. N. Y. Central R. R. Co.*, 1 T. & C. (N. Y.) 297; *New Orleans, &c. R. R. Co. v. Henning*, 15 Wall. (U. S.) 649; *New Orleans, &c. R. R. Co. v. Bailey*, 40 Miss. 395; *Lateral Branch R. R. Co. v. Newark*, 4 Ind. 471; *Wright v. London, &c. Ry. Co.*, L. R. 1 Q. B. Div. 252; *Holmes v. North-Eastern Ry. Co.*, L. R. 6 Exchq. 123.

⁷ *Hoffman v. N. Y. Central, &c. R. R. Co.*, 75 N. Y. 605; *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129; *Knight v. Portland, &c. R. R. Co.*, 56 Me. 234.

⁸ *Dublin, &c. Ry. Co. v. Slaterry*, L. R. 3 App. Cas. 1155.

from the station;¹ draymen, etc., who are there either to deposit or receive freight for others, or, indeed, any one who is there upon business comes under the head of persons invited to be there, but persons who are there from mere curiosity, or idlers, loungers, etc., do not.² The company may at any time revoke the implied license under which persons are at its stations not upon business,³ or even those who are there upon business, if they refuse to comply with any of the reasonable regulations of the company.⁴ But a passenger, or one who is at a station to take a train, cannot be expelled from the station at the mere caprice of the station-agent. Thus, in a Michigan case,⁵ a station-agent assaulted a passenger for not leaving the waiting-room when ordered, the passenger having enraged him by spitting on the floor. It was held that this did not constitute an excuse for the passenger's expulsion.

SEC. 344. Duty as to Private Crossings, Ways, etc.—Where a railway company allows a private crossing to be used for public travel for a considerable period, it has been held liable to a person who is injured at the crossing by the negligence of the company.⁶ In a Pennsylvania case,⁷ a person crossing a railway track by a common and well-known foot-path used by the public is not a trespasser, and the railroad company is not relieved from liability for a negligent injury to him, on the ground that being a trespasser he was therefore guilty of contributory negligence.

In a New York case,⁸ the plaintiff's intestate was run over and killed at a private crossing which had been used by the public without objection from the company, for thirty years, and it was held that this long acquiescence in the public use by the company imposed a duty upon it as to persons crossing the track to exercise reasonable care in the movement of its trains so as to protect them from injury. In an action against a railroad company for the death of plaintiff's intestate, who was killed by the defendant's train at a private crossing, instructions to the jury that although there was no

¹ *Quimby v. Boston, &c. R. R. Co.*, 69 Me. 340; *Tobin v. Portland, &c. R. R. Co.*, 59 Me. 188.

² *Gillis v. Spence*, 59 Penn. St. 129.

³ *Johnson v. Chicago, &c. R. R. Co.*, 51 Iowa, 25; *Harris v. Stevens*, 31 Vt. 79; *Pittsburgh, &c. R. R. Co. v. Bingham*, ante.

⁴ *Gillis v. Spence*, ante; *Com. v. Power*, 7 Met. (Mass.) 506.

⁵ *People v. McKay*, 46 Mich. 43; 41 Am. Rep. —.

⁶ *Sweeney v. Old Colony R. R. Co.*, 10 Allen (Mass.), 368.

⁷ *Philadelphia, &c. R. R. Co. v. Troutman*, 6 Am. & Eng. R. R. Cas. 117; *Penn. R. R. Co. v. Lewis*, 70 Penn. St. 33.

⁸ *Barry v. N. Y. Central, &c. R. R. Co.*, 92 N. Y. 289.

statutory obligation which required the railroad company to ring a bell when approaching a private crossing, the jury might find it was negligence to omit to do this when running at a high rate of speed, at a time when the view of the train was so obstructed by cars on a side track as to render the use of the crossing peculiarly hazardous; that a railroad company ordinarily has the right to run its trains at any rate of speed it thinks proper, but that the condition of the crossing might impose some restrictions upon this right, and under the circumstances the jury might predicate negligence upon excessive speed; that one using such crossing must use all his faculties to ascertain whether or not he could do so safely; that one has the right to assume that the company would use more than ordinary care in approaching a crossing so obstructed, — were held to be unexceptionable.¹ Of course, where it receives a compensation for the use of its premises, it owes to the person paying it the duty of ordinary care.² The duty and liability to keep its premises safe does not grow out of a mere license or permission to use them, but the use of them by the public must be known to and acquiesced in by the company.³ But where the company has permitted people to cross its track at a certain point until it has become a species of habit to do so, it is not at liberty to allow cars to run over that portion of its track without any control over them.⁴ But as to mere trespassers it owes no duty except not to inflict wilful injury upon them.⁵

¹ *Barry v. N. Y. Central R. Co.*, 92 N. Y. 289; *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Cordell v. N. Y. Central R. Co.*, 70 N. Y. 119; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65.

² *Marfell v. South Wales Ry. Co.*, 8 C. B. N. S. 525.

³ *Matze v. New York Central, &c. R. R. Co.*, 1 Hun (N. Y.), 217. In this case the plaintiff, while crossing the defendant's track, in the evening, at a point where a street was to be, but had not yet been laid out, but where people were in the habit of crossing and recrossing, was struck by one of the defendant's engines and injured. It was held that he was guilty of contributory negligence in going upon defendant's track, and that he could not recover. The court charged that, even if the public had no right to use the land of the

defendant, at the place where the plaintiff was injured, yet if people were in the habit of crossing and recrossing there, that the company was bound to use care and caution in running at that point. It was held that this was error; that no right could be acquired by the public in such a manner, without evidence of notice to the company and subsequent acquiescence by it. Even if there was any evidence from which a license might be inferred, such license created no legal right and imposed no duty upon the defendant, except the general duty which every man owes to others, to do them no intentional wrong or injury. *Nicholson v. Erie R. R. Co.*, 41 N. Y. 530; *Philadelphia, &c. R. R. Co. v. Hummell*, 44 Penn. St. 375.

⁴ *Sutton v. New York Central, &c. R. R. Co.*, 4 Hun (N. Y.), 760. In *Kay*

⁵ *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129.

SEC. 345. Liability where Road is operated by Receiver or by Trustees. — It will be seen further on that a railway company cannot voluntarily divest itself of the control of its road by leasing it and thus relieve itself from responsibility for injuries sustained by third parties in consequence of the negligent operation of the road, except where the lease is expressly authorized and makes provision for the exemption of the lessor from liability.¹ But where the surrender of the control over its road is involuntary and compulsory, the company ceases to be liable after the road has passed out of its hands.² Therefore it is not responsible for injuries or torts of any kind committed by mortgagees, or trustees under a mortgage executed with due authority of law, while they are in possession of the road under the mortgage, and are operating it;³ nor for torts committed or injuries

v. Penn. R. Co., 65 Penn. 269, the defendants had leased a lot of land for their side tracks, and had the right to its exclusive possession. By sufferance they had permitted the public to pass over the lot. They detached some cars and sent them around a curve without a brakeman. They were held liable to a person upon that lot, who was run over by these cars. *Brown v. Hannibal, &c. R. Co.*, 50 Mo. 461; *Baltimore, &c. R. Co., v. Trainor*, 33 Md. 542.

¹ *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; 21 Am. & Eng. R. Cas. 226; *post*, § 490.

² *Central &c. R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; *State v. Consolidated, &c. R. Co.*, 67 Me. 479.

³ *Daniels v. Hart*, 118 Mass. 543; *State v. Consolidated, &c. R. Co.*, 67 Me. 479; *Rogers v. Wheeler*, 43 N. Y. 598; *Ballou v. Farnum*, 9 Allen (Mass.), 47; *Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9; *Lamphear v. Buckingham*, 33 Conn. 237. The rule seems to be that trustees or mortgagees operating the road are personally liable to owners of freight and to passengers to the same extent as if they were the owners of the road. They are equally liable for all other injuries committed in the operation of the road. *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; 19 Am. & Eng. Ency. Law, p. 932; *Kain v. Smith*, 80 N. Y. 458; *Barter v. Wheeler*, 49 N. H. 9; *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486; 43 N. Y.

598; 52 N. Y. 262; *Daniels v. Hart*, 118 Mass. 543 (injury by fire); *Lyman v. Vt. Central R. Co.*, 59 Vt. 167; 30 Am. & Eng. R. Cas. 167; *Roxbury v. Central Vt. R. Co.*, 60 Vt. 121; *Ballou v. Farnum*, 9 Allen (Mass.), 47. In some of the States their liability is regulated by statute. See *Farrell v. Union Trust Co.*, 77 Mo. 475; 13 Am. & Eng. R. Cas. 552; *Stratton v. European, &c. R. Co.*, 76 Me. 269; 17 Am. & Eng. R. Cas. 269 (statute making trustee liable only to extent of funds received by him); *Jones v. Seligman*, 81 N. Y. 191; 3 Am. & Eng. R. Cas. 236.

A railroad company having appropriated private property for its use and constructed its road, its capital stock, franchises, and all other property belonging to it, stand charged with a public trust to be drawn upon to compensate those who are injured by the negligent operation of the road. *Gates v. Boston, &c. R. Co.*, 53 Conn. 334; 24 Am. & Eng. R. Cas. 143; *Taylor v. South, &c. R. Co.*, 13 Fed. Rep. 152; 6 Am. & Eng. R. Cas. 602. Therefore the company cannot shift its responsibilities or relieve itself from liability by a voluntary surrender of the possession and control of its road by a trust deed. *Naglee v. Alexandria, &c. R. Co.*, 83 Va. 707; 32 Am. & Eng. R. Cas. 401; *Acker v. Alexandria, &c. R. Co.*, 84 Va. 648; *Grand Tower, &c. R. Co. v. Ullman*, 89 Ill. 244. So where by virtue of a contract the trustees are operating the road for the benefit of the company and its bond-

inflicted while the road is in the hands of and being operated by a receiver, because it is then in the custody of the court.¹ But if the

holders, the company remains liable. *Union Trust Co. v. Cuppy*, 26 Kan. 756; 11 Am. & Eng. R. Cas. 562. In such a case the trustees are mere agents of the company.

¹ *Godfrey v. Ohio, &c. R. Co.*, 116 Ind. 30; 37 Am. & Eng. R. Cas. 8; *State v. Wabash, &c. R. Co.*, 115 Ind. 446; 35 Am. & Eng. R. Cas. 1; *Brockert v. Central Iowa R. Co.*, 82 Iowa, 370; *Memphis, &c. R. Co., v. Stringfellow*, 44 Ark. 322; 51 Am. Rep. 598; 23 Am. & Eng. R. Cas. 374; *Kansas, &c. R. Co. v. Dorough*, 72 Tex. 108; *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44; *Turner v. Hannibal, &c. R. Co.*, 74 Mo. 602; 6 Am. & Eng. R. Cas. 38; *State v. Vt. Central R. Co.*, 30 Vt. 108; *Ohio, &c. R. Co. v. Davis*, 23 Ind. 553; *Turner v. Hannibal, &c. R. Co.*, 74 Mo. 602; *Ohio, &c. R. Co., v. Anderson*, 10 Ill. App. 313. Compare, however, *Kansas Pacific R. Co. v. Wood*, 24 Kan. 619. In this case an act passed in 1874 required railroad companies to fence their track or be liable for stock killed by their trains. The defendant company was then an existing corporation. In 1876 its property passed into the hands of a duly appointed receiver. In 1879 the receiver was discharged and the property returned to the company. Just before this was done, and while the possession of the receiver continued, plaintiff's stock were killed, owing to the absence of a fence along the track. It was held that the company was liable. See also *Union Trust Co. v. Cuppy*, 26 Kan. 756; 11 Am. & Eng. R. Cas. 562.

The relation of principal and agent cannot be said to exist between the company and the receiver, and the former cannot be held liable for his negligence. *Metz v. Buffalo, &c. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201; *Murphy v. Holbrook*, 20 Ohio St. 137; 5 Am. Rep. 633; *Ohio, &c. R. Co. v. Anderson*, 10 Ill. App. 313; *Scholar v. Hudson River R. Co.* 38 Barb. (N. Y.) 653; *Ohio, &c. R. Co. v. Davis*, 23 Ind. 553; 85 Am. Dec. 477. Compare *Bartlett v. Keim*, 50 N. J. L. 260; 35 Am. & Eng. R. Cas. 215. In *Texas Pacific R. Co. v. Hoffman*, 83 Tex. 286; 18 S. W. Rep. 741, an action for personal injuries

was begun against the receiver, pending which the receivership was terminated, the road was restored to the company, and the company made a party defendant to the action. There was no evidence that the earnings of the road while in the hands of the receiver, had been applied to the improvement of the road. It was held that the trial court erred in refusing to instruct that the company was not liable. But the company would be liable in such a case if the receiver had applied all the net earnings to the repair and improvement of the road. *Texas, &c. R. Co. v. White*, 82 Tex. 543; *Texas, &c. R. Co. v. Comstock*, 83 Tex. 537; *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421; *Texas Pac. R. Co. v. Bloom (Tex.)*, 20 S. W. Rep. 133. See similar cases in *Texas, &c. R. Co. v. Geiger*, 79 Tex. 13; *Brown v. Rosedale St. R. Co. (Tex.)*, 15 S. W. Rep. 120; *Brown v. Warner*, 78 Tex. 543; *Texas, &c. R. Co. v. Geiger*, 79 Tex. 13; *Graham v. Chapman*, 58 Hun (N. Y.), 602; 11 N. Y. Supp. 318. Where a company permits its tickets to be issued to passengers, in the same form after the receiver has taken possession as before, it is held that it is liable to a passenger for an injury occasioned to him, at least where there is nothing to show that the latter had any knowledge of the receiver's appointment. The contract of carriage in such a case is considered to have been made with the company and not the receiver. *Washington, &c. R. Co. v. Brown*, 17 Wall. (U. S.) 445. The jurisdiction of the court over a receiver of a railroad is ended when he is discharged and the property returned; and an order, in the decree discharging him, that such property shall be relieved from liability on claims not established by intervention in the suit in which the receiver was appointed does not affect the liability of the corporation for personal injuries received while the receiver operated the road, when it has received, in the form of improvements, earnings out of which damages for such injuries should be paid, although the claim is not established by such intervention. *Texas, &c. R. Co. v. Bailey (Tex.)*, 18 S. W. Rep. 481.

road is under the partial control of the company, it still remains liable.¹ Receivers are treated as public officers, and are not personally responsible for the acts of the persons employed by them in the operation of the road,² but may be sued by leave of the court.³ But, in Massachusetts, it is held that the possession of a receiver not necessarily being a defence at law, the court which appointed him may permit the suit to go on.⁴ When a judgment in such an action is obtained against a receiver, it is not a personal judgment, but one to be paid out of the funds of the company in his hands, under the direction of the court appointing him.⁵ There is a class of respectable authorities which hold, however, that they are personally liable while pursuing the business of common carriers;⁶ but it is somewhat difficult to understand upon what principle this rule of liability is predicated.

SEC. 345 *a*. **Crimes against Railroads.**⁷—Independently of the criminal liability at common law for obstructing a railway in order to wreck trains passing thereon, thereby endangering human life, it is made a special offence by statute in many of the States to interfere in any way with the operation of a railway.⁸ These statutes are,

¹ *Alexandria, &c. R. Co. v. Brown*, 17 Wall. (U. S.) 445.

² *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44; *Candat v. Berney*, 63 N. Y. 281; *Hopkins v. Connell*, 2 Tenn. Ch. 323; *Burton v. Barbour*, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1; *Melendy v. Barbour*, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; *Ryan v. Hayes*, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501. On the same principles, an assignee appointed in bankruptcy proceedings is not personally liable for injuries occasioned in the operation of the road. *Metz v. Buffalo, &c. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201.

³ *Klein v. Jewett*, 26 N. J. Eq. 474; *Burton v. Barbour*, 104 U. S. 426; *Jordan v. Wills*, 3 Woods (U. S.), 527. See *post*, § 482, as to this subject.

⁴ *Hills v. Parker*, 111 Mass. 508. See also *Blumenthal v. Brainard*, 38 Vt. 402; *Newell v. Smith*, 38 Vt. 402.

⁵ *Murphy v. Holbrook*, 20 Ohio St. 137.

⁶ *Blumenthal v. Brainard*, 38 Vt. 402; *Newell v. Smith*, 49 Vt. 255; *Allen v. Central R. Co.*, 42 Iowa, 683; *Kinney v. Crocker*, 18 Wis. 74, and see *Kane v. Smith*, 80 N. Y. 458.

⁷ This section does not logically come within this chapter, but it is placed here because too small to constitute a separate chapter.

⁸ The Georgia act making it a criminal offence to obstruct railroads includes a street railway. *Hodge v. State*, 82 Ga. 643; 38 Am. & Eng. R. Cas. 520; *Price v. State*, 74 Ga. 28. The Tennessee statute relating to obstructions whereby cars are thrown off the track does not apply to the placing of an obstruction which causes the derailment of a hand-car. *Harris v. State*, 14 Lea (Tenn.), 485. See also *Crawford v. State*, 15 Lea (Tenn.), 343; 54 Am. Rep. 423. Under the Minnesota statute providing for the punishment of persons who injure, remove, or destroy any part of a structure appertaining to a railway, it is no offence to remove a part of the fence along the right of way. *State v. Walsh*, 43 Minn. 444; 42 Am. & Eng. R. Cas. 623. See also *State v. Boyd*, 86 N. C. 634; 9 Am. & Eng. R. Cas. 155; *State v. Hinson*, 82 N. C. 597, where the North Carolina act against shooting in cars, etc., is considered; *Clifton v. State*, 73 Ala. 473, construction of § 4239 of Alabama

however, merely affirmative of the common law. Under them and at common law a person who wilfully places an obstruction on the track is liable to indictment and punishment,¹ and it is no defence that he intended merely to stop the train and claim a reward, and that he did not intend to endanger human life.² So where one improperly goes upon a railway and signals a train to stop by holding up his hands, he is liable as having obstructed a train;³ so also where he alters the posted signals and thus causes the train to stop.⁴

Code (1876); *Kiser v. State*, 89 Ga. 421; sufficiency of indictment for shooting into car, under § 4437 of the code; *Boyer v. Com.* (Ky.), 19 S. W. 845, breaking open car. As to the indictment of a person for selling half fare or excursion tickets without license under the Indiana statute, see *State v. Fry*, 81 Ind. 7; 6 Am. & Eng. R. Cas. 340.

¹ *State v. Kilty*, 28 Minn. 421; 9 Am. & Eng. R. Cas. 153 (defendant may be convicted although no engine or train was stopped or impeded); *Com. v. Bakeman*, 105 Mass. 53 (no intent to injure any particular person need be proved); *Reg. v. Bradford*, 8 Cox Cr. Cas. 309 (defendant convicted though road had not been opened up for traffic when obstruction was placed); *Reg. v. Upton*, 5 Cox Cr. Cas. 298; *Reg. v. Monaghan*, 11 Cox Cr. Cas. 608; *Roberts v. Preston*, 9 C. B. N. s. 206; 99 E. C. L. 208; *Clifton v. State*, 73 Ala. 473 (no specific intent to endanger life or property need be proved); *People v. Adams*, 16 Hun (N. Y.), 549; *Riley v. State*, 95 Ind. 446. Under the Texas statute, to warrant a conviction the evidence must show that the instruction might have endangered human life. *Bullion v. State*, 7 Tex. App. 452. As to the sufficiency of the indictment in such cases see *Riley v. State*, 95 Ind. 446; *Coghill v. State*, 37 Ind. 117; *State v. Wentworth*, 37 N. H. 196; *Com. v. Bakeman*, 105 Mass. 53; *Barton v. State*, 28 Tex. App. 482; *Com. v. Hicks*, 7 Allen (Mass.), 573.

In *State v. Douglas*, 44 Kan. 618; in order to secure evidence against the accused, who was suspected, a detective, employed by the railroad company, offered to accused to become his accomplice, and the two went to the track together, where the detective placed obstructions on the track, defendant standing by advising and encouraging him, believing that it was done with a criminal intent. The court held that the evidence would not sustain a conviction; that a person consenting to a thing which is, in itself, innocent, does not thereby commit an offence, though at the time it may appear to him to be an offence, and he believes it to be so. In *Duncan v. State*, 29 Fla. 439; 10 So. Rep. 815, it is held that the structures forming parts of railway beds, by which they span streams, ditches, etc., are "bridges," the wilful or malicious burning of which is made an offence by § 4, p. 358 of McClelland's Digest. The court also held that on the trial of a person charged with such offence, it was sufficient to show that the company owning the road was a corporation *de facto*. As to this last proposition see also *Com. v. Carroll*, 145 Mass. 403.

² *State v. Beckman*, 57 N. H. 174; *Crawford v. State*, 15 Lea (Tenn.), 343; 54 Am. Rep. 423.

³ *Regina v. Hardy*, 11 Cox Cr. Cas. 550.

⁴ *Regina v. Hatfield*, 11 Cox Cr. Cas. 574; L. R. 1 Crim. Cas. Res. 253.

CHAPTER XXI.

TICKETS: EXPULSION OF PASSENGERS.

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| <p>SEC. 346. Nature of Tickets.
 347. Limited Tickets.
 348. Family Tickets.
 349. Mistake of Conductor.
 350. Lost Ticket.
 351. Tickets upon freight trains.
 352. Mileage-Tickets.
 353. Children's Fare.
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 356. Failure to stop at station.</p> | <p>357. Conductor's Check.
 358. Rates of Fare.
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 365. Free Passes or Tickets.</p> |
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SEC. 346. **Nature of Tickets.** — Tickets issued by a railway company to a passenger are *prima facie* evidence of a contract between the railway company and the passenger, to transport the latter and his personal baggage from the station named therein as the place of departure, to the station named therein as the place of destination, and is held to be a receipt, token, or voucher, showing payment for the passage, rather than a contract;¹ and by its purchase the relation of passenger and carrier is said to be consummated.² The contract between the passenger and the company by which the ticket was issued is implied by law, except so far as it is expressed upon the face of the ticket. A ticket which bears upon its face no qualifications, conditions, or limitations as to its use, is undoubtedly good for a passage from the station of departure to the station named

¹ Logan v. Hannibal, &c. R. Co., 77 Mo. 663; 12 Am. & Eng. R. Cas. 141; Pier v. Finch, 24 Barb. (N. Y.) 514; Henderson v. Stevenson, L. R. 2 Sc. App. 470; Quimby v. Vanderbilt, 17 N. Y. 306; Rawson v. Penn. R. Co., 48 N. Y. 212; Elmore v. Sands, 54 N. Y. 512; State v. Overton, 24 N. J. L. 435; Gord v. Manchester, &c. R. Co., 52 N. H. 596; Johnson v. Concord R. Co., 46 N. H. 213.

² Wabash, &c. R. Co. v. Rector, 104

Ill. 296; 9 Am. & Eng. R. Cas. 264. But this proposition must be taken with a qualification. If a person, as is often the case, purchases a ticket in advance of the time he intends to use it, the relation of passenger and carrier does not arise at the time of the purchase, but only from the time when the person reaches the station for the purpose, and with the intention of taking passage under the ticket.

therein, any time within the statutory period of limitation from its date, provided it has not been mutilated so as to bear the appearance of having been used. In Maine, it is provided by statute that a ticket for passage on any railroad is binding on the company for six years from its date, and that the holder shall have the right to stop off at the usual stopping places as often as he chooses.¹

A ticket not being a written contract, it is held that parol evidence is admissible to show what representations in reference thereto were made by the ticket-agent at the time of its sale, — as, that the passenger had a right to stop over on it, etc.² A ticket issued from A. to B. is good only for a passage from A. to B., and is not good for a reverse trip, as from B. to A.; and the fact that the holder has been permitted upon previous occasions to make such reverse trip upon such tickets, does not change the rule.³ This rule cannot be applied, however, where the passenger holds a round-trip ticket, and the first conductor by mistake takes up the return coupon instead of the one for the outgoing trip. In such a case the passenger is entitled to return on the remaining coupon, after offering to the conductor an explanation.⁴

A railway ticket marked "Good on passenger trains only" does not imply that all the passenger trains of the road will stop at the station designated on it, nor impose upon the company any obligation to stop there contrary to its rules. Thus, the plaintiff purchased

¹ Such a statute cannot apply to a ticket purchased in Canada for a continuous passage to a station in Maine, since to concede to it such an effect would be to render it unconstitutional as an interference with the exclusive power of Congress over interstate commerce. *Lafarier v. Grand Trunk R. Co.* (Me.), 52 Am. & Eng. R. Cas. 226. The same principle is upheld in *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388; 3 Am. & Eng. R. Cas. 432, where the ticket was purchased in Portland for a station in Canada. See also *Dryden v. Grand Trunk R. Co.*, 60 Me. 512.

² *Robinson v. Nashville, &c. R. Co.*, 2 Lea (Tenn.), 594; *Van Kirk v. Penn. R. Co.*, 76 Penn. St. 66; 18 Am. Rep. 404. And it may be shown that the station-agent, before selling the ticket, informed the passenger that he could stop over at an intermediate station upon it, when in fact the ticket was indorsed as "Good for this day only;" and the holder having stopped

over one day, the conductor refused to accept the ticket for the remaining passage, and expelled him from the train. The court held that the representations of the ticket-agent were admissible, and that the conductor, upon being informed of the fact, was bound to return the excess of fare, or deduct it from the fare demanded before he could expel him. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298. But see *Melville v. Baltimore, &c. R. Co.*, 2 Mackay (D. C.), 63, where it was held that parol evidence is not admissible to vary the terms of a railway ticket.

³ *Kelley v. Boston, &c. R. Co.*, 67 Me. 163; 24 Am. Rep. 19 and notes; *Pennsylvania Co. v. Bray*, 125 Ind. 229; 25 N. E. Rep. 439; *Coleman v. New York, &c. R. Co.*, 106 Mass. 160.

⁴ *Lake Erie, &c. R. Co. v. Fixe*, 88 Ind. 381; 45 Am. Rep. 464; 11 Am. & Eng. R. Cas. 109; *post*, § 349.

of the defendant a ticket from Cincinnati and return. Upon the plaintiff's return he took a train, without inquiry, which did not stop at Hardenburgh, and the conductor refused to stop there, and left him at a station eight miles beyond. In an action for the damages the court held that there could be no recovery, because the plaintiff was bound to ascertain, before starting out upon it, whether the train stopped at Hardenburgh or not.¹

SEC. 347. Limited Tickets.—A railway company may impose any reasonable conditions as to the use of their tickets. Thus, they may, by a printed notice thereon, provide that it shall not be transferable; and when this condition is imposed, no one but the person to whom it was issued is entitled to passage on it. Thus, a person purchased a through ticket which, among other things, provided that it should not be transferable. At a station on the way, it was taken up and a conductor's check was issued for it, calling for one continuous passage to San Francisco. At an intermediate station, the passenger left the train, and sold the ticket to the plaintiff, who attempted to use it on the same train. The conductor refused to accept it, and the court held that his refusal was not wrongful, that the plaintiff was not entitled to ride upon the check.² And where

¹ Ohio, &c. R. Co. v. Swarthout, 67 Ind. 567; 33 Am. Rep. 104. See also Ohio, &c. R. Co. v. Hatton, 60 Ind. 12.

² Cody v. Central Pacific R. Co., 4 Sawyer (U. S.), 114; Langdon v. Howell, 4 Q. B. Div. 437. Thus the plaintiff bought a season-ticket on a railroad, on which was indorsed: "CONDITIONS. This ticket is not transferable, nor will any allowance be made in case it may not be used for the whole term for which it was issued. It is subject to inspection at any time by the conductor; a refusal to comply will necessitate collection of full fare each time. It is good only for a continuous passage between the points named. If lost or mislaid, it will not be replaced by the company. The holder will please return when renewing." Upon the face of the ticket the words, "For conditions, see other side," were printed, in small capitals. The plaintiff lost his ticket, refused to pay fare, and was put off the train. It was held that he was bound to know the conditions; that the conditions were lawful, reasonable, and proper regulations; and that he was rightfully put off the train.

Cresson v. Philadelphia, &c. R. Co., 11 Phila. (Penn.) 597. In Post v. Chicago, &c. R. Co., 14 Neb. 110, 45 Am. Rep. 100, 9 Am. & Eng. R. Cas. 345, it appeared that one, T., bought a third-class ticket from a point in Nebraska, to Boston, Mass., paying therefor \$66, the regular first-class fare being \$140 for the same trip. T. signed the printed contract which provided that no stop-over privileges were allowed, that in consideration of the reduced price it should be good for only twenty days from date of purchase, that "this ticket is not transferable and shall become 'void' if not presented for passage on the trip for which it is sold," and that if T. failed to comply with this agreement "either of the companies may refuse to accept this ticket, or any coupons thereof, and demand regular fare." T. travelled to Omaha on the ticket and then sold it to H. who transferred it to plaintiff who tried to ride on it; but was expelled, the conductor appropriating the ticket when plaintiff on inquiry told him his name was not T. Plaintiff having brought his action the jury rendered a verdict for \$31.70 in his favor, this being

the holder of a commutation-ticket, in violation of its terms, has permitted it to be used by other persons, the company has the right to take up the ticket and demand payment of fare, and upon failure of payment, to expel the offending person from its train.¹ But if there is no such condition printed upon the ticket, it is good in the hands of any person, being treated as evidencing a contract to carry the bearer. So a condition as to the time within which a ticket shall be used is good. As, if a ticket is issued with the words "good for this train and day only" the ticket is not, after the holder has entered upon his passage, good for a passage upon any other train, or upon any other day.²

Even where a ticket is silent as to the right of a passenger to stop over at an intermediate station, inasmuch as the contract is entire, the passenger has no right to stop over and resume his journey on the same ticket.³ The execution of the contract, when once entered upon, must be completed according to its terms, and cannot be completed according to the convenience of the passenger.⁴ So that if a

\$6.70 in excess of the price he paid for the ticket. On appeal the judgment of the lower court rendered on this verdict was affirmed. The conductor had no right to take up such ticket, but only to refuse to receive it.

¹ *Freidenrich v. Baltimore, &c. R. Co.*, 53 Md. 201. Outside the cover of a paper book of coupons forming a railway-ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words, "Cheap return ticket, London to Paris and back, second-class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains. The plaintiff, having been injured while travelling by virtue of the ticket in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it. The jury were directed that if it was brought to his notice it would afford a defence, and on being asked the question suggested in *Parker v. Southeastern Ry. Co.*, 2 C. D. 416, whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, an-

swered that it was not, and found a verdict in his favor. He moved for judgment. It was held, distinguishing *Henderson v. Stevenson*, L. R. 2 H. L. (Sc.) 470, that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants. *Burke v. Southeastern Ry. Co.*, 5 C. P. Div. 1.

² *McClure v. Philadelphia, &c. R. Co.*, 34 Md. 532; *Elmore v. Sands*, 54 N. Y. 512; *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611; *Barker v. Coffin*, 31 Barb. (N. Y.) 556; *Shedd v. Troy, &c. R. Co.*, 40 Vt. 88.

³ *Roberts v. Koehler*, 30 Fed. Rep. 94; *Drew v. Central Pacific R. Co.*, 51 Cal. 425. See also *Hill v. Syracuse, &c. R. Co.*, 63 N. Y. 101.

⁴ *Dunphy v. Erie R. Co.*, 10 J. & S. (N. Y. Superior Ct.) 128; *Barker v. Coffin*, 31 Barb. (N. Y.) 556; *Stone v. Chicago, &c. R. Co.*, 47 Iowa, 82; *Oil Creek, &c. R. Co. v. Clark*, 72 Penn. St. 231; *Terry v. Flushing, &c. R. Co.*, 13 Hun (N. Y.), 359; *State v. Overton*, 24 N. J. L. 435; *Hamilton v. N. Y. Central R. Co.*, 51 N. Y. 100; *Cheney v. Boston, &c. R. Co.*, 11 Met. (Mass.) 121; *Johnson v. Concord R. Co.*, 46 N. H. 213; *Breen v.*

passenger having a continuous trip ticket leaves the cars at an intermediate station, he cannot subsequently pursue his journey upon another train, or upon another day, and if he refuses to pay his fare, he may be lawfully expelled,¹ unless, as is the case in Maine, the statute prohibits a railway company from limiting the right of a ticket-holder to any particular train, and permits a passenger to stop at any station and resume his journey upon the same ticket.²

A ticket "good for this trip only" is treated as not imposing a limitation as to time but to a *journey*; and it is good until used, if within six years from its date;³ though when the trip is entered upon, it must be continued and consummated upon the same train. Where there is no limitation as to the time within which a ticket shall be used, it is good at any time within the statutory period of limitation; and this is the rule even as to an excursion ticket, which contains no express limitation as to the time within which it shall be used. Thus, where a passenger holding such a ticket was expelled from the car for refusing to pay his fare, it was held that the company was liable, although the car at the time was on the track of another company as whose agent the first corporation sold the ticket on which the passenger was travelling.⁴ But the company may impose any reasonable limitation as to time. A ticket "good only two days after date," or "for this day and train only," ceases to have any validity after that date, although it has never been used.⁵ Where a ticket is issued upon condition "not good unless used

Texas, &c. R. Co., 50 Tex. 43; Cleveland, &c. R. Co. v. Bartram, 11 Ohio St. 457; Beebe v. Ayres, 28 Barb. (N. Y.) 275; Drew v. Central Pacific R. Co., 51 Cal. 425; Dietrich v. Penn. R. Co., 71 Penn. St. 432; Van Kirk v. Penn. R. Co., 76 Penn. St. 66.

A passenger who has a ticket calling for a continuous passage only has no right to take a train that cannot give him such a passage, and then to leave this train at an intermediate station and again to enter and take passage on another train which will take him to his destination, even though the latter train is the one he should have taken in the first instance. Gulf, &c. R. Co. v. Henry (Tex.), 52 Am. & Eng. R. Cas. 230. See same principle in Dietrich v. Pennsylvania R. Co., 71 Penn. St. 436; Stone v. Chicago, &c. R. Co., 47 Iowa, 85; Johnson v. Phila-

delphia, &c. R. Co., 63 Md. 107; 18 Am. & Eng. R. Cas. 304.

¹ Petrie v. Pennsylvania R. Co., 42 N. J. L. 449.

² Dryden v. Grand Trunk R. Co., 60 Me. 512.

³ Pier v. Finch, 24 Barb. (N. Y.) 514; Drew v. Central Pacific R. Co., 51 Cal. 425.

⁴ Pennsylvania R. Co. v. Spicker, 105 Penn. St. 142; 23 Am. & Eng. R. Cas. 672.

⁵ Boston & Lowell R. Co. v. Proctor, 1 Allen (Mass.), 267; Gale v. Delaware, &c. R. Co., 7 Hun (N. Y.), 670. See, holding that limitations as to the time of user are valid, Hill v. Syracuse, &c. R. Co., 63 N. Y. 101; State v. Campbell, 32 N. J. L. 301; Nelson v. Long Island, &c. R. Co., 7 Hun (N. Y.), 140.

within two days," it is invalid unless the trip is entered upon within that time; but if the holder enters upon the trip before midnight of the last day, it entitles him to complete the passage under the ticket,¹ although the passage cannot be completed until the next day.

While, as before stated, a ticket for a continuous trip does not permit a passenger to stop over at an intermediate station,² yet it is held that where the ticket entitles the holder to a passage over the roads of different railway companies the holder is only bound to make the trip continuous upon each road, when once entered upon by the holder; he has a right to stop as long as he pleases at points where he is obliged to change cars, provided of course that he uses his ticket within the time limitation to which it is subject.³ So

¹ *Evans v. Iron Mountain R. Co.*, 25 Ohio St. 70; *Auerbach v. N. Y. Central R. Co.*, 89 N. Y. 281; *Hill v. Syracuse, &c. R. Co.*, 63 N. Y. 101. A ticket issued Dec. 6, "good for two days," does not expire until midnight of Dec. 8. *Georgia, &c. R. Co. v. Bigelow*, 68 Ga. 219; *Evans v. St. Louis, &c. R. Co.*, 11 Mo. App. 463.

² In *Gale v. Delaware, &c. R. Co.*, 7 Hun (N. Y.), 670, the plaintiff purchased a ticket from Summit, N. J., to New York. The ticket was dated Jan. 27, 1874, which was stamped on the ticket, and with other printed matter on the ticket were these words: "Good for this day and train only." For this ticket the plaintiff paid fifty-five cents. After he had procured the ticket he took a seat in one of the defendant's trains, which left Summit at 8.10 o'clock in the morning of the same day, and rode on that train to a place called Orange Junction. Between Summit and Orange Junction the conductor of the train had taken the plaintiff's ticket and punched it, and handed it back to him, and he kept it in his possession. At Orange Junction the plaintiff left the train voluntarily, and went by other conveyance to Newark on the line of defendant's road. At Newark the plaintiff got on another train of cars of defendant, which was proceeding to New York on the same day, for the purpose of continuing his journey, and offered the conductor of this train this same ticket which had been punched by

the conductor of the former train. The conductor refused to receive it on the ground that it had been used, and demanded payment of the plaintiff's fare; the plaintiff refused to pay and was put off the train, and it was held that he could not recover. *Livingstone v. Grand Trunk Ry. Co.*, 21 L. C. Jurist, 13; *Craig v. Great Western Ry. Co.*, 24 U. C. Q. B. 504; *Briggs v. Grand Trunk Ry. Co.*, 24 U. C. Q. B. 510.

³ Thus, in the case of *Auerbach v. N. Y. Central R. Co.*, 89 N. Y. 281; 42 Am. Rep. 290; 6 Am. & Eng. R. Cas. 234, the plaintiff, being in St. Louis on September 21, purchased of the Ohio & Miss. R. Co. a ticket for a passage from St. Louis, over the several railroads mentioned in coupons annexed to the ticket, to the city of New York. It was specified on the ticket that it was "good" for one continuous passage to point named "in coupon attached;" that in selling the ticket for passage over other roads, the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that if he failed to comply with such agreement, either of the companies might refuse to accept the ticket, or any coupon thereof, and demand the full regular fare, which he agreed to pay.

where distinct tickets are issued over each road, each ticket is a voucher for a separate journey, and the passenger is not obliged to go through upon the same day;¹ and the same rule exists where, although upon the same piece of paper, there are distinct coupons for each road, as the rights and obligations are the same as though distinct tickets had been issued.²

The contract for a passage is an entire one with each company over whose road it is issued; and therefore a passenger is not, as a matter of course, entitled to a "lay-over" check or ticket, unless the conductor sees fit to give it, unless the company has contracted to give it upon proper application. But if one is given, its terms are binding both upon the company and the passenger.³ Thus, a lay-over ticket "good for five days" from its date is not good for a passage after the five days have elapsed; and the fact that the baggage-master checks the baggage of the holder, and punches his ticket in doing so, does not operate as a waiver of the limitation, as the baggage-master has no authority, express or implied, to waive such a condition.⁴ But

He left St. Louis on the day he bought the ticket, and rode to Cincinnati and there stopped a day. He then rode to Cleveland and stayed there a few hours, and then rode to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached, to the conductor, and it was accepted by him and recognized as a proper ticket, and punched several times until the plaintiff reached Hudson, about three or four o'clock, A. M., September 27, when the conductor in charge of the train declined to recognize the ticket, on the ground that the time had run out, and demanded

three dollars fare to the city of New York, which the plaintiff declined to pay. The conductor, with some force, then ejected him from the car. The trial court nonsuited the plaintiff, but the Court of Appeals set aside the non-suit, and held that the plaintiff, having commenced his journey during the life of the ticket, was entitled to complete his journey under it; and that a ticket for a continuous passage over several roads does not require the passenger to complete his journey on the same train or day, but that he is entitled to use the ticket any time during its life on any of the roads, provided his trip over that road is continuous.

¹ *Brooks v. Grand Trunk R. Co.*, 15 Mich. 332.

² *Knight v. Portland, &c. R. Co.*, 56 Me. 234; 96 Am. Dec. 449; *Milnor v. N. Y., &c. R. Co.*, 4 Daly (N. Y. C. P.), 355.

³ *Churchill v. Chicago, &c. R. Co.*, 67 Ill. 390; *Johnson v. Concord R. Co.*, 46 N. H. 213; 88 Am. Dec. 199; *Dietrich v. Penn. R. Co.*, 71 Penn. St. 432; 10 Am. Rep. 711.

⁴ *Wentz v. Erie R. Co.*, 3 Hun (N. Y.), 241. See also *Churchill v. Chicago, &c. R.*

at the time within the period named therein, such lay-over ticket or check is good.¹

Co., 67 Ill. 390. A condition of that character is reasonable. *Yorton v. Milwaukee, &c. R. Co.*, 54 Wis. 234; *Lake Shore, &c. R. Co. v. Pierce*, 47 Mich. 277; *Isaacson v. N. Y. Central R. Co.*, 25 Hun (N. Y.), 350. Where a passenger is informed by the conductor that he may get off at a station and continue his journey by the next train upon the same ticket, and the passenger, relying upon the statement, leaves the train at that station, the company is bound to carry him on the next train to the end of his route upon that ticket, and is estopped from denying the authority of the conductor to make such agreement. *Tarbell v. Northern Central R. Co.*, 24 Hun (N. Y.), 51. The regulations of the defendant required that a passenger's ticket should be indorsed by the conductor, if he desired to stop over at a way station and resume his journey on another train. Plaintiff, a passenger on a through train to New York, desiring to stop over at Little Falls, applied to the conductor of the train on which he was travelling to have his ticket so indorsed, and was told by him it was not necessary. Plaintiff stopped over at Little Falls, and resumed his journey on another train of the defendant, and without applying to the conductor of that train to have his ticket indorsed, again stopped over at Amsterdam. On attempting to resume his journey from Amsterdam on another train, the conductor refused to recognize his ticket, because it was not indorsed in accordance with the company's regulations, and ejected him for non-payment of his fare. It was held that the privilege granted him by the conductor of the train on which he first embarked, of stopping over at a way station, without having his ticket indorsed as required by the company's regulations, was exhausted by his stopping over at Little Falls, and that, when he again embarked, he became subject to all the company's regulations, and that he could not again stop over at a way station without having his ticket indorsed. *Denny v. New York Central, &c. R. Co.*, 5 Daly (N. Y. C. P.), 50. The plaintiff was riding in the cars by virtue of a ticket that did

not give him a right to discontinuous passage. Having stopped at an intermediate point, and having entered another train, he claimed the right to continue his journey on such ticket, under permission given by a conductor of the first train. Refusing to pay his fare, he was put off, it appearing that only train-agents had the power to modify the force of such tickets. It was held such expulsion was justifiable, although, at the trial, the plaintiff testified that it was, in point of fact, a train-agent, and not a conductor, that had given him the privilege claimed. *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Oil Creek, &c. R. Co. v. Allegheny R. Co.*, 72 Penn. St. 231; *Dietrich v. Penn. R. Co.*, 71 Penn. St. 432; 10 Am. Rep. 711. A rule requiring a passenger to obtain a stop-over check if he desires to break his journey is a reasonable one. A passenger has no right to travel on a train upon the individual check of a conductor given him upon another train. *Breen v. Texas, &c. R. Co.*, 50 Tex. 43. Where a passenger buys a through ticket, which the conductor takes up, and delivers a check marked, "Good for this day and train only," the passenger has no right to get off at an intermediate station, and travel to his place of destination by a subsequent train without payment of fare. And upon refusal to pay, he may be expelled at any point. The conductor is not bound to expel him at a station. *McClure v. Philadelphia, &c. R. Co.*, 34 Md. 532. Where a passenger purchases a ticket and enters a railroad train, and after the train starts upon the road, he gives up his ticket to the conductor, he cannot at any intermediate station, by virtue of his subsisting contract, leave the train while in the reasonable performance of the contract, and claim a seat upon another train. *Cleveland, &c. R. Co. v. Bartram*, 11 Ohio St. 457.

¹ Thus, in the case of *McMahon v. Third Avenue R. Co.*, 47 N. Y. Super. Ct. 28, the passenger, A., rode up Third Avenue to Sixty-fifth street, New York, in a car which stopped there, and received from the conductor a check "good only

In all cases the conditions and limitations attached to the ticket must be *reasonable*, or they will have no validity, and they are always unreasonable if they are impossible of performance. Thus, if a ticket is issued from A. to B. *and return*, "*good for this day only*," and there is no train which leaves B. on the return trip to A. after the arrival of the train, the condition would be unreasonable, and the holder would be entitled to a return passage to A. on the first train leaving B. for A. on the next day. So, if a ticket is issued from A. to B., "*good for this day only*," and by some accident to the train, or through the train becoming stalled from any cause, the trip is not completed until the next day, the ticket is good for the balance of the passage;¹ because the condition is subject to the implied limitation that the train shall make the passage within the time limited, and that the company shall upon its part perform its obligation. Whether, if such a ticket is issued, and by reason of a delay in the running of the train it does not reach B. until the time for the return train to leave has arrived, whereas, if it had arrived upon time the holder would have had two or three hours in which to have attended to business in B., the holder would be entitled to a passage under his ticket upon the first train next day, has not been decided; but upon principle it would seem that he would have, because it is not to be presumed that people purchase railway-tickets merely for the pleasure of riding, but rather because they have business of some kind at their point of destination. In the case of an excursion-ticket where the train is not run upon schedule time, the rule would be different. But all reasonable conditions imposed by the printed terms of the ticket are binding upon the passenger, and his right to a passage under the ticket depends upon his compliance therewith. Thus, where a ticket is issued to a certain place "*and return*," but contains a condition that the holder shall procure it to be stamped by the ticket-agent at the place of destination as a condition to its

from Sixty-fifth street up to Yorkville and Harlem for a continuous ride, July 6, 1878." From Sixty-fifth street he walked up, and later in the day took another car of the line below Sixty-fifth street, paid his fare to that street, and then tendered his check for the rest of his ride. The conductor refused to take it, and put him off the car without unnecessary violence. It was held that A. could maintain an action against the company.

¹ Auerbach v. N. Y. Central R. Co.,

89 N. Y. 281; 43 Am. Rep. 745. "Return tickets," by the rules of the company, were not good for use upon Sunday trains. These rules were published with the timetables, and posted in the depots of the company. It was held that the regulation was sufficiently published, and the company was justified in expelling a passenger who insisted upon travelling upon such a ticket upon Sunday. Highland Ry. Co. v. Menzies, 5 Sc. Sess. Cas. (4th series) 887.

being good for the return trip, such condition must be complied with.¹ And the courts hold that the conductor may rightfully refuse to recognize such a ticket on the return trip if it has not been stamped as the condition required, although the passenger attempted to have the stamping done but failed because when he called at the ticket-office of the carrier who was authorized to affix the stamp, just before the arrival of the train, the agent could not be found. The passenger having been expelled for refusing to pay fare, it was held that he had no right to damages.²

A regulation by which one who desires to stop over between the starting-point and destination is required to procure a stop-over ticket from the conductor is reasonable, and if the passenger, in such a case, asks the proper conductor for a stop-over ticket, and, through the conductor's fault receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train.³ A "stop-over" ticket good for thirty days does not give an unlimited right to stop at intermediate stations on connecting roads. Where the holder of such a ticket received a check, good for a ten days' stop at such a station, it was held that he was properly ejected from the train after ten days, though within the thirty, for a refusal to pay fare from such station to the terminus of that road.⁴ The holder of a special excursion railway-ticket for a round trip, surrendering it, and receiving instead a regular ticket substituted by the company for its own convenience, must return upon the excursion train.⁵ If a person purchases a ticket to a certain point, which is taken up by the conductor before such point is reached, and the passenger stops at an intermediate station, he cannot complete his passage without

¹ A return ticket from L. to Chicago was sold to plaintiff, having a condition printed on it and signed by him that it should not be good unless taken to the office in Chicago and there stamped and re-signed. The court held that plaintiff could not return on such ticket unless the conditions were complied with, and that on refusing to pay fare he should be expelled. *Edwards v. Lake Shore, &c. R. Co.*, 81 Mich. 364; 45 N. W. Rep. 827. See same rule applied in *Betha v. Northeastern R. Co.*, 26 S. C. 91. See also *Rawitzky v. Louisville, &c. R. Co.*, 40

La. An. 47 (stipulation requiring passenger to have himself identified upheld).

² *Mosher v. St. Louis, &c. R. Co.*, 17 Fed. Rep. 880; 23 id. 326; *affirmed*, 127 U. S. 395; 34 Am. & Eng. R. Cas. 339. See also *Elliott v. Western, &c. R. Co.*, 53 Ga. 454.

³ *Yorton v. Milwaukee, &c. R. Co.*, 54 Wis. 234; 41 Am. Rep. 23; *Lake Shore, &c. R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340.

⁴ *Kelsey v. Michigan Cent. R. Co.*, 28 Hun (N. Y.), 460.

⁵ *McRae v. Wilmington, &c. R. Co.*, 88 N. C. 526; 43 Am. Rep. 745.

payment of the fare. By giving up his ticket without taking a stop-over check from the conductor, his right to a passage is lost when he leaves the train for his own convenience to pursue his journey by another train, at an intermediate station.¹

The question as to whether a regulation in regard to the use of tickets is reasonable or not is generally a mixed one of law and fact. It has been held reasonable for railway companies to provide that a person must purchase a ticket, or be excluded from its station;² or purchase a ticket before entering the cars, or pay a higher sum for his fare;³ or purchase a ticket for passage on a freight train, or be expelled therefrom.⁴ So, too, it has been held that a regulation that merchandise shall not be carried as baggage is reasonable;⁵ also that passengers must exhibit their tickets whenever requested to do so by the conductor, or be ejected from the train;⁶ that passengers must surrender their tickets during the trip, or pay their fare again;⁷ that colored persons shall occupy separate seats;⁸ that certain cars shall be occupied by ladies only, or gentlemen accompanied with ladies;⁹ and indeed any regulation which is necessary for its own protection, or for the convenience, comfort, or safety, of its passengers.¹⁰

SEC. 348. Family Tickets — Where tickets are issued for family use, as commutation-tickets, good for any member of a certain person's family, such person's children, although they have attained the age of majority, do not by that circumstance cease to be

¹ *Townsend v. N. Y. Central R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419. See also *Chicago, &c. R. Co. v. Griffiths*, 68 Ill. 499. Substantially the same doctrine as to the rights and duties of passengers and carriers is laid down in *Shelton v. Lake Shore, &c. R. Co.*, 29 Ohio St. 214; *Downs v. New York, &c. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *McClure v. Philadelphia, &c. R. Co.*, 34 Md. 532; 6 Am. Rep. 345. But see *Toledo, &c. R. Co. v. McDonough*, 53 Ind. 289; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298; 18 Am. Rep. 220; *Palmer v. Charlotte, &c. R. Co.*, 3 Rich. (S. C.) 580; *Hamilton v. N. Y. Central R. Co.*, 53 N. Y. 25; *English v. Delaware, &c. Canal Co.*, 66 N. Y. 454; 23 Am. Rep. 69; *Toledo, &c. R. Co. v. McDonough*, 53 Ind. 289.

² *Harris v. Stevens*, 31 Vt. 79.

³ *State v. Gould*, 53 Me. 279; *St. Louis,*

&c. R. Co. v. Dalby, 19 Ill. 353; *Porter v. N. Y. Central R. Co.*, 34 Barb. (N. Y.) 353; *Crocker v. New London, &c. R. Co.*, 24 Conn. 249.

⁴ *Cleveland, &c. R. Co. v. Bartram*, 11 Ohio St. 457.

⁵ *Merrihew v. Milwaukee, &c. R. Co.*, 5 Am. Law Reg. (Wis.) 364.

⁶ *Hibbard v. New York, &c. R. Co.*, 15 N. Y. 455.

⁷ *Northern R. Co. v. Page*, 22 Barb. (N. Y.) 130; *Vedder v. Fellows*, 20 N. Y. 126. But see *State v. Thompson*, 20 N. H. 250.

⁸ *West Chester, &c. R. Co. v. Miles*, 55 Penn. St. 209; *ante*, § 297.

⁹ *Peck v. N. Y. Central R. Co.*, 70 N. Y. 587; *Bass v. Chicago, &c. R. Co.*, 39 Wis. 636.

¹⁰ See this subject, *ante*, § 297.

members of the family, so as to be deprived of the right to use the ticket.¹

SEC. 349. Mistake of Company's Ticket-Agent, or of Conductor. — Where the passenger asks and pays for a certain ticket, and the station-agent by mistake gives him a different one, which does not entitle him to the passage desired, the conductor has no right to expel him, and the company is liable in damages if he is expelled. The passenger has a right to rely on the agent to give him the right ticket.² There are authorities which hold the other way,³ but it seems that their views are indefensible. It is true the conductor may have no possible means of knowing the facts of the case except through the passenger's statement, which is liable to be prejudiced or untruthful, but there is no reason why the company may not be made to respond in damages on the ground that the expulsion was the proximate consequence of the wrongful act of its agent who sold the ticket.⁴

If a passenger's ticket is faulty through the mistake of a conductor in tearing off the wrong coupon, or punching it in the wrong place, a subsequent conductor has no right to expel him after an explanation, and if he does so the company must respond in damages for the

¹ *Chicago, &c. R. Co. v. Chisholm*, 79 Ill. 584. In consideration of a conveyance of land by G. and his wife, the company agreed to carry said G. and his wife, and any of their children, free of charge. Plaintiff, being one of G.'s children, has a right to be carried free under such an agreement, though he paid no part of the consideration and is beyond the age of maturity. *Grimes v. Minneapolis, &c. R. Co.*, 37 Minn. 66; 31 Am. & Eng. R. Cas. 123. Where the company agrees to furnish to a firm "a ticket entitling either one" of the partners of the firm, but "only one on any train, to occupy one seat and travel on the train of the company," only one member at a time has a right of passage on it. *Knopf v. Richmond, &c. R. Co.*, 85 Va. 769; 37 Am. & Eng. R. Cas. 140.

² *Georgia R., &c. Co. v. Dougherty*, 86 Ga. 744; 12 S. E. Rep. 747; *Poulin v. Chicago, &c. R. Co.*, 47 Fed. Rep. 858; *Carpenter v. Washington, &c. R. Co.*, 121 U. S. 474; 31 Am. & Eng. R. Cas. 120. Where the agent punches the wrong

date, so that the ticket expires before it could possibly be used, the passenger may recover damages if the conductor refuses to accept it and expels her. *Johnson v. Northern Pac. R. Co.*, 46 Fed. Rep. 347.

³ *Frederick v. Marquette, &c. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531 (shorter ticket than that desired); *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; 46 Am. Rep. 481 (street-car passenger holding wrong check by mistake of conductor of another car).

In *Weaver v. Rome, &c. R. Co.*, 3 Th. & C. 270, a passenger paid for three tickets, but the agent by mistake gave him only two, which he gave to the two friends with him. It was held that he could be ejected for refusal to pay fare after getting on the train.

⁴ In *McKay v. Ohio River R. Co.*, 34 W. Va. 65; 11 S. E. Rep. 737, it is said that in such a case recovery may be had, but only by suing on the contract; that there is no remedy in tort. But the better rule is that passenger may sue in tort for a breach of the carrier's public duty.

wrongful expulsion.¹ Thus, where a round trip-ticket has two coupons attached to it, and on the first trip the conductor takes up the wrong coupon, the holder of the ticket is entitled to return on the other coupon, after explaining how the mistake came about; and the conductor in charge of the train on which the return trip is made has no right to deny him passage, though in the absence of such explanation he would have a right to expel him.² So where the conductor on the first trip punched the wrong coupon, and then tried to rectify his mistake by writing on it "cancelled by mistake," the passenger cannot be expelled for refusing to pay fare on the return trip if he offers the mutilated coupon with an explanation.³ The same principle prevails where a person purchases a ticket to a certain station which the conductor takes up without giving the holder a check, and there is a change of conductors before the station is reached, and the new conductor, although informed by the passenger of the facts, demands the fare, and on the passenger's refusal to pay it, expels him — the company is liable therefor, as the passenger cannot be prejudiced by the mistakes or neglect of the conductor.⁴ And such also is the rule where a person has paid his fare to the conductor to a certain station, but before it is reached the conductor again demands the fare, denying that it has been paid, and expels him for not paying it again.⁵

SEC. 350. Lost Ticket. — As between the conductor and the passenger, the ticket is the only evidence of the passenger's right to a passage, and he must produce it when called for;⁶ and if he loses the ticket, his right to travel upon it ceases, and if, after being given a reasonable time to find it, he fails to pay his fare, he may be expelled from the train,⁷ and this, even though the conductor has once

¹ *Frederick v. Marquette, &c. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531; *Johnson v. Northern Pac. R. Co.*, 46 Fed. Rep. 347.

² *Kansas City, &c. R. Co. v. Riley*, 68 Miss. 765; 9 So. Rep. 443; *Pennsylvania Co. v. Bray*, 125 Ind. 229; 25 N. E. Rep. 439 (explanation must be offered); *Louisville, &c. R. Co. v. Fixe*, 88 Ind. 381; 11 Am. & Eng. R. Cas. 109.

³ *Philadelphia, &c. R. Co. v. Rice*, 64 Md. 63; 21 Atl. Rep. 97; *New York, &c. R. Co. v. Winter*, 143 U. S. 60.

The conductor is bound to recognize his own coupons, and cannot eject a passenger because his ticket is irregular, if he him-

self was the person who gave passenger the ticket presented. *Hardy v. New York Cent. R. Co.*, 58 Hun (N. Y.), 607.

⁴ *Pittsburgh, &c. R. Co. v. Henigh*, 39 Ind. 509.

⁵ *Indianapolis, &c. R. Co. v. Mulligan*, 50 Ind. 392.

Frederick v. Marquette, &c. R. Co., 37 Mich. 342; 26 Am. Rep. 531.

⁷ *Duke v. Great Western Ry. Co.*, 14 U. C. Q. B. 377. In *Frederick v. Marquette, &c. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531, it was decided that as between the conductor and the passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel

punched the ticket and knows that the passenger had it, and though passenger may explain that the absence of his ticket is due to his having inadvertently left it at home, or by accident misplaced it.¹ But he is entitled to a reasonable time in which to find the ticket, and cannot be expelled until such reasonable time has been given him,² and the question as to what is a reasonable time is one of fact

(same principle in *Hufford v. Grand Rapids, &c. R. Co.*, 53 Mich. 118; 18 N. W. Rep. 580). No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. The court said: "If when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must at his peril concede what the passenger claims, or take all the responsibilities of a trespasser, if he refuses. It is easy to see that his position is one in which any lawless person, with sufficient impudence and recklessness, may have him at disadvantage, and where he can never be certain, if he performs his apparent duty to his employer, that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable, either for railroad companies or for the public. The public is interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger, who by accident or mistake is without the proper evidence of his right to a passage, though he has paid for it, it is better that he submit to the temporary inconvenience than that the business of the road be interrupted to the general annoyance of all who are upon the train. The conductor's duty, when the passenger is without the evidence of having paid his fare, is plain and imperative, and it can serve no good purpose and settle no rights to have a controversy with him. The passenger gains nothing by being put off the car, and loses nothing by paying what is demanded and staying on." *Hubbard v. Grand Rapids R. Co.*, 64 Mich. 631; 28 Am. & Eng. R. Cas. 129; *Georgia R., &c. Co. v. Eskew*, 86 Ga. 641; 12 Am. &

Eng. R. Cas. 1061; *Townsend v. New York Central R. Co.*, 56 New York, 295; 15 Am. Rep. 419; *Chicago, &c. R. Co. v. Griffin*, 68 Ill. 499; *McClure v. Philadelphia, &c. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Shelton v. Lake Shore, &c. R. Co.*, 29 Ohio St. 214; *Downs v. N. Y., &c. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Yorton v. Milwaukee, &c. R. Co.*, 54 Wis. 234; 11 N. W. Rep. 482; 41 Am. Rep. 23.

¹ *Cresson v. Phila., &c. R. Co.*, 11 Phila. (Penn.) 597; *Cooper v. London, &c. Ry. Co.*, 4 Exch. Div. 88. And the same is true as to commutation-tickets. *Ripley v. New Jersey R. Co.*, 31 N. J. L. 388; *Downs v. N. Y., &c. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77. In this last case the conductor knew the passenger well, and knew that he had a commutation-ticket, but it was held that he might still expel him for not producing his ticket or for refusing to pay fare.

² *Louisville, &c. R. Co. v. Fleming*, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 347; *Clark v. Wilmington, &c. R. Co.*, 91 N. C. 506; 18 Am. & Eng. R. Cas. 366; *Internat., &c. R. Co. v. Wilkes*, 68 Tex. 617; 34 Am. & Eng. R. Cas. 331; *So. Car. R. Co. v. Nix*, 68 Ga. 572. In this case a passenger having presented his ticket to the conductor, it was punched and returned to him. The passenger mislaid the ticket, and for a time was unable to find it. The conductor afterwards again called for it, and as the passenger was unable to find it, he was ejected from the car, without any demand of payment of fare. It was held that his expulsion was wrongful. *Robson v. New York Central R. Co.*, 21 Hun (N. Y.), 387. But if, after half an hour, he fails to produce his ticket and will not pay fare, the conductor is justified in expelling him. *Chicago, &c. R. Co. v. Willard*, 31 Ill. App. 435.

for the jury, in view of all the circumstances.¹ He is not entitled to this lenity, however, if, when he boarded the train, he knew that his ticket was lost or that he did not have it with him.²

The company is bound to furnish its passengers with seats, and one may rightfully refuse to surrender his ticket unless a seat is provided for him.³ There may of course be cases where, owing to an unusual and extraordinary influx of passengers which the company could not anticipate, it might require the passenger to do without a seat temporarily, but this can apply only in very exceptional cases. It is said by some authorities that the passenger cannot refuse to

In *Maples v. New York, &c. R. Co.*, 38 Conn. 557, 9 Am. Rep. 434, the plaintiff purchased of the defendants a commutation-ticket, which conferred upon him the right to ride upon the defendants' railroad between the city of New York and the town of Westport during the ensuing year, upon certain conditions. One of the conditions was that the ticket should be shown to conductors when requested, or when required by the rules of the company. One of the company's rules in force during the year required commuters to show their tickets to conductors when required, in the same manner as other passengers. At the time of purchasing the ticket the plaintiff signed a receipt containing similar conditions. During the year, while the plaintiff was riding in the defendants' cars between New York and Westport, he was requested by the conductor to show his ticket. He had his ticket upon his person, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but acting in accordance with the instructions of the defendants, he demanded of the plaintiff his fare for the trip, and on his refusal to pay it ejected him from the train. It was held that the plaintiff was not bound to produce his ticket immediately when requested, but was entitled to a reasonable time to find it, and was entitled to ride as long as there was any reasonable expectation of finding it during the trip; that under the circumstances the production of his ticket by the plaintiff was the merest formality; that in the absence of an express stipulation in the contract that

the plaintiff should pay the fare of the passage unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendants in rescinding it, and treating the plaintiff as a trespasser on the train; and that if the defendants had a right to eject the plaintiff from the train, they had no right to do so elsewhere than at a regular station on the road, — that any rule or regulation of the defendants which required or allowed such an act to be done (between stations) to a person in the condition of the plaintiff was unreasonable and void. In a very similar case, however, the court held that if the passenger had inadvertently left his ticket at home he could be expelled at a regular station if he refused to pay fare, even though the conductor knew he had a season-ticket and had seen him travel on it every day for some time. The passenger was therefore not allowed to recover damages for the expulsion, no unnecessary force having been used to effect it. *Downs v. New York, &c. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77. As to an offer by third persons to pay fare, see *post*, § 361. As to intoxicated passengers, *post*, § 362.

¹ *Hayes v. N. Y. Central R. Co.* (N. Y. 1884), 31 Alb. L. J. 469; 18 Am. & Eng. R. Cas. 363.

² *Crawford v. Cincinnati, &c. R. Co.*, 26 Ohio St. 580; *Downs v. New York, &c. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77.

³ *Hardenburgh v. St. Paul, &c. R. Co.*, 39 Minn. 3; *State v. Thompson*, 29 N. H. 250; *Davis v. Kansas City, &c. R. Co.*, 53 Mo. 317; *Memphis, &c. R. Co. v. Benson*, 85 Tenn. 630; *St. Louis, &c. R. Co. v. Leigh*, 45 Ark. 368.

surrender his ticket and continue to ride; that he cannot secure a free ride merely because there are no seats.¹ But if this is true, it is difficult to see of what value is the passenger's right to refuse to give up his ticket or to demand a seat. It appears to be the better doctrine that he would be entitled to continue his journey without surrendering his ticket until the company had discharged its obligation by furnishing him with a seat.²

A passenger purchased a ticket from N. to W., and rode on it to M., an intermediate point; the ticket, under the rules of the company, was cancelled for the whole route; he voluntarily left the train at M. Subsequently he offered the ticket for his passage from M. to W.; the conductor took up the ticket, refused to allow him to ride, and required him to leave the train. In a suit by the passenger against the company, the trial court rejected evidence by the plaintiff that he offered to pay his fare if the conductor would return the ticket, which was refused, to be followed by evidence that in claiming to ride he had acted in good faith upon information, by a ticket-agent from whom he had previously purchased the ticket, that he had a right to ride on it. It was held to be error. It was also held that the declarations of a ticket-agent, made some days after selling a ticket, although not evidence to establish a contract with the plaintiff, are evidence to show that plaintiff in good faith claimed a right to ride on the ticket.³

In an action to recover damages alleged to have been sustained by the plaintiff by being improperly removed from defendant's cars after having paid his fare, evidence going to show that on other occasions plaintiff had done acts showing an attempt to avoid payment of his fare is properly rejected.⁴ In a suit by a passenger against a railway company for wrongfully putting him off the train for failing to pay the fare demanded, it is competent to prove by himself and other witnesses that they had travelled over the road between the termini of the plaintiff's trip, with and without tickets, and never paid more than the plaintiff tendered to the conductors.⁵ In a suit for damages, caused by the action of a conductor in ejecting plaintiff from the cars, he need not allege nor prove that specific

¹ See Hutchinson on Carriers (2d ed.), § 609.

² See *State v. Thompson*, 20 N. H. 250.

³ *Vankirk v. Pennsylvania R. Co.*, 76 Penn. St. 66; 18 Am. Rep. 404.

⁴ *English v. Delaware, &c. Canal Co.*, 4 Hun (N. Y.), 683; *affirmed*, 66 N. Y. 454.

⁵ *Louisville, Nashville, &c. R. Co. v. Guinan*, 11 Lea (Tenn.), 98.

authority was conferred on the conductor by the company to perform such acts, where it appeared that he was intrusted with all authority which concerned the reception or rejection of passengers.¹

SEC. 351. Tickets upon Freight Trains.—It is competent for railroad companies to establish a rule that passengers shall not be permitted to ride on freight trains without they are provided with tickets, and that trains will not stop at stations where tickets are not sold, either to take on or let off passengers.² But where a certain freight train was in the habit of carrying passengers to a certain station, and before the company had made any different rule in this respect, the plaintiff purchased a ticket for such station; but was informed by the conductor that he would not stop there, and was advised to take passage upon another extra train, to which he applied, and was refused passage, whereupon he entered the first train and informed the conductor of the facts, and was carried upon that train to the next station beyond the one named in his ticket, it was held that the company was liable to him for the damages.³ This is upon the principle that, while a railway company may make reasonable rules for the regulation of its business and the running of its trains, yet in the adoption of these rules regard must be had to the convenience and interest of the travelling public. It may forbid the transportation of freight and passengers on the same trains, or may require passengers travelling on freight trains to procure tickets before entering the cars; but in such cases, reasonable facilities for procuring tickets, at or about the time of the arrival or departure of the trains, must be afforded, according to the established usages of all railroads;⁴ and it is not reasonable, while allowing passengers to travel on freight trains, to afford them no opportunity to procure tickets, except at such hours as would make it more expeditious to travel by the passenger trains.⁵

¹ *Travers v. Kansas Pacific R. Co.*, 63 Mo. 421..

² *Lake Shore, &c. R. Co. v. Greenwood*, 79 Penn. St. 373; *St. Louis, &c. R. Co. v. Myrtle*, 51 Ind. 566; *Indianapolis, &c. R. Co. v. Kennedy*, 77 Ind. 507; *Falkner v. Ohio, &c. R. Co.*, 55 Ind. 369; *Toledo, &c. R. Co. v. Patterson*, 63 Ill. 304; *Cleveland, &c. R. Co. v. Bartram*, 11 Ohio St. 457.

³ *Chicago, &c. R. Co. v. Fisher*, 66 Ill. 152; *St. Louis, &c. R. Co. v. Myrtle*, 51 Ind. 566.

⁴ *Eddy v. Ryder*, 79 Tex. 53; 15 S. W. Rep. 113.

⁵ *Evans v. Memphis, &c. R. Co.*, 56 Ala. 246; 23 Am. Rep. 771; *So. Kan. R. Co. v. Hinsdale*, 38 Kan. 507; 34 Am. & Eng. R. Cas. 256. A company advertised to carry on its freight trains passengers who would purchase a freight-train ticket. Plaintiff waited at the ticket-office until the train was about to start, but saw no one, and so made no effort to get a ticket. It was held that he could not recover for being put off the train, as the company

SEC. 352. Mileage-Tickets. — A railway company may make any reasonable regulation or condition as to the use of special tickets used by it, and they are binding upon the holder. Thus, mileage-tickets, issued upon condition that they shall be used within a certain time, cease to be valid after the expiration of that time. Thus, a mileage-ticket stipulated that it should be good only for a certain period, and that, if presented after the expiration of that time, the conductor should take up the ticket and collect the fare. It was held that its use a number of times in violation of the condition would not estop the company to take it up, and eject the passenger from its train upon refusal to pay fare.¹ In another case the holder of a thousand-mile ticket, purporting to be "good for six months only," after the period had elapsed, having first obtained legal advice that the ticket was good until the thousand miles were travelled, and before the ticket was exhausted, took his seat in the baggage-car of a train, refused payment of fare otherwise than by offering his ticket, and was forcibly ejected from the train, — it was held that the ticket was void; that the holder was not a passenger, but became a trespasser on entering the baggage-car, and, upon his refusal to get off, might be ejected, with the use of any force necessary to that end.² So where a mileage-ticket is issued by a company owning two lines of railway, and the ticket upon its face purports to be good for a certain number of miles upon each road, the holder cannot claim to ride upon the ticket upon either of the roads more than the number of miles for which it is declared to be good upon such road.³

had a right to insist upon its rule that it would carry no passengers on the freight train except those holding tickets. *Indianapolis, &c. R. Co. v. Kennedy*, 77 Ind. 507.

¹ *Sherman v. Chicago, &c. R. Co.*, 40 Iowa, 45.

² *Lillis v. St. Louis, &c. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255.

³ *Terre Haute, &c. R. Co. v. Fitzgerald*, 47 Ind. 79. In this case the railroad company, being the owner of one line and the lessee of another, the two forming a continuous line between Indianapolis and St. Louis, sold a thousand-mile ticket, authorizing the purchaser to travel three hundred miles upon one of said roads and seven hundred miles upon the other; having black figures representing the one road and red figures the other, with directions to

conductors to punch out the black figures, representing the number of miles travelled on the western division of the road, and the red figures for the miles travelled on the eastern end. On the back of the ticket were printed conditions, signed by the purchaser, among which was a stipulation that the miles travelled each trip should be indicated by the conductor punching out corresponding figures on the opposite side. After all the red figures had been punched out, the purchaser offered the ticket for passage on a train on the eastern division of the through line, which the conductor refused to accept, though there were black figures not punched out, amounting to the number of miles for which it was offered; and the holder of the ticket, refusing to pay his fare, or to leave the car unless forcibly ejected, was

SEC. 353. Children's Fare. — A railway company may charge full fare for an infant child, if it chooses to do so, but it is generally customary not to charge any fare for children under a certain age, and to charge half-fare for children between certain ages. If a person having a child in charge refuses to pay its fare when demanded, not only the child, but the person so having it in charge, although he has paid his fare, may be expelled from the train. Thus, in a recent case in Maryland,¹ the plaintiff was a passenger upon the defendant's train, having in charge her young sister. She had paid her own fare, but refused to pay her sister's fare, and thereupon both were put off the train. In an action to recover damages therefor, it was held that the expulsion of both was lawful. The court said: "The plaintiff had paid her own fare, and the defendant had no right of course to eject her from the train, unless there was a contract, express or implied, on her part to pay the fare of her younger sister. There is no evidence of an express contract, and if one is to be implied it must be on the ground that the younger sister was under her charge, and being under her charge and thus responsible for her presence in the car, it was her duty to see the fare was paid. The defendant was under no obligation, of course, to carry the younger sister without being paid a reasonable compensation, and if she was under the plaintiff's charge, it is but fair and reasonable to hold her responsible for the fare. Under such circumstances the law would imply an agreement on her part to pay the fare of the child, and if she refused to pay it, the defendant had the right to put off both the plaintiff and the child, — the plaintiff, because she had not complied with the contract on her part implied by law, and the child, because the company was not required to carry it unless its fare was paid according to the rules and regulations of the company."²

SEC. 354. Coupons. — A traveller on a railroad train, travelling on a commutation-coupon-ticket, which provides that the coupons

put off by the train-men. It was held that the terms expressed upon the ticket constituted a contract between the seller and the purchaser of the ticket, and that his refusal to pay fare or leave the car on request justified his expulsion.

¹ Philadelphia, &c. R. Co. v. Hoeflich, 62 Md. 300; 50 Am. Rep. 223; 18 Rep. 832.

² See also Pittsburgh, &c. R. Co. v. Dewin, 86 Ill. 296, where a father with

his wife and children were held to have been properly expelled for his refusal to pay fare except for himself and his wife. On similar principles, but conversely, where a mother travelling with her child pays proper fare for both, but the conductor refuses to recognize the child's right to ride and expels him, the mother may get off with it and recover of the company as for the wrongful expulsion of both. Gibson v. Railroad Co., 30 Fed. Rep. 904.

shall be void if detached by any other person than the conductor, and that the ticket shall be shown to the conductor each trip, who shall detach the coupons for the number of miles to be travelled, technically violates the contract by detaching the coupons himself. If, while detaching the coupons, his attention is called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupons to the conductor; in which event it would be the duty of the latter, if he saw the coupons detached, or could readily ascertain by inspection that they had not been detached from the ticket, to accept them. But the conductor would not be bound to receive the detached coupons without seeing the ticket;¹ and in a case of this kind, if the passenger insists upon tearing off the coupons after the conductor has warned him that they will not be received, the conductor may require him to pay fare or be expelled, although he saw him detach the coupons, and there was otherwise no objection to the ticket.²

SEC. 355. Misinformation given by Company's Agents.—A passenger bought a ticket from one point to another on the line of a railway, and return. She went to the latter point, but when she started to return the conductor informed her, on entering the car, that she could not return on that ticket; that if she did she would have to pay the fare. She thereupon left the train, and remained until the next train, on which she returned home without extra charge. She sued the railway company. It was held that the suit was founded on a breach of contract, and actual damages only could be recovered; or if none, then nominal damages. Exemplary damages cannot be allowed for a breach of contract.³ If, by means of improper information, given by a ticket-agent, a passenger is misled in the purchase of his ticket, the company will be liable for the resulting damages. But such incorrect information will not entitle him to remain upon the train without payment of fare, in violation of the rules of the company.⁴ A railway passenger has a right to act upon the conduct and directions of the agents of the corporation in relation

¹ Louisville, &c. R. Co. v. Harris, 9 Lea (Tenn.), 180; 42 Am. Rep. 668.

² Norfolk, &c. R. Co. v. Wysor, 82 Va. 250; 26 Am. & Eng. R. Cas. 234; Louisville, &c. R. Co. v. Harris, 9 Lea (Tenn.), 180; 42 Am. Rep. 668; 16 Am. & Eng. R. Cas. 374.

³ Goins v. Western R. Co., 68 Ga. 190.

But see as to the propriety of holding that such an action is necessarily *ex contractu*, ante, § 296. See also 133 Mass. 15.

⁴ Lake Shore, &c. R. Co. v. Pierce, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340; Yorton v. Milwaukee, &c. R. Co., 54 Wis. 234; 41 Am. Rep. 23; Pittsburgh, &c. R. Co. v. Nuzum, 60 Ind. 533.

to tickets,¹ until differently informed. Thus, where a train-agent informs a passenger that he may leave the train at a certain station and continue his journey on the same ticket, the company is bound thereby, and cannot deny the authority of its agent nor expel a passenger who relies upon his representations.² But the case must depend in a measure upon the apparent extent of the agent's authority; the company cannot be bound by the idle statements in regard to tickets which are made to inquiring passengers by its lower employes who have no authority whatever to make such statements. The passenger must be able to show that he had a right to believe that the agent spoke with authority, and to rely on his representations.³ In a Michigan case,⁴ the plaintiff bought a railway-ticket between certain points, and relying on the representations of the ticket-agent, took a particular train to reach his destination. The conductor, on taking up his ticket, told him that the train did not stop at the station he wished to reach, and that he must leave the train at the last station at which it would stop before reaching it, or pay additional fare and go on to the next station beyond it. The plaintiff did neither, was put off the train before arriving at the point for which his ticket was bought, and sued the company for damages. It was held that he was not entitled to recover. The court said: "Railway passengers have a right to rely, until differently informed, on the information received by them from ticket-agents in answer to their inquiries as to the stoppages of

¹ *Lake Erie, &c. R. Co. v. Fixe*, 88 Ind. 381; 45 Am. Rep. 464; *Erie R. Co. v. Winter*, 143 U. S. 60.

² *Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.), 51; *Toledo, &c. R. Co. v. McDonough*, 53 Ind. 290.

³ Thus, a conductor on taking up a ticket handed the passenger a check with the words "good for this day and train only," and having the date clearly indicated. The passenger, desiring to stop off at a certain station, inquired of the agent there whether he could stop over on his check, and was informed that the check was good until taken up. Passenger stopped, and on taking the train a few days later was expelled for non-payment of fare, though he offered the conductor's check. His case was not sustained, the court holding that the expulsion was not wrongful, that the agent had no authority to tell passenger that the check was good for any

other day or train than that indicated. *McClure v. Phila., &c. R. Co.*, 34 Md. 532; 6 Am. Rep. 345.

⁴ *Lake Shore, &c. R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340. But the taking up of a passenger's ticket to a station at which the train is forbidden to stop by the regulations of the company does not make it the duty of the conductor to stop the train there. It is the duty of a passenger to inquire before embarking on a train whether it will stop at the station of his destination; and if he does so and is misled by an agent authorized to speak for the company, he has his action against the company for the misdirections, but not for the refusal of the conductor to stop there if it be a station at which the train is forbidden to stop by the regulations of the company. *St. Louis, &c. R. Co. v. Atchison*, 47 Ark. 74; *South, &c. R. Co. v. Huffman*, 76 Ala. 492.

trains, but they must not disregard reasonable means of information. Where a railway passenger is not in fault in starting on a particular train, he has a right of action against the company for damages arising from its refusal or failure to take him to his destination as agreed through its ticket-agent. But whatever his remedy, he has no right, without paying additional fare, to stay on the train after he is notified by the conductor that it will not stop there; and the additional exaction will be an element of the damages to which he may be entitled. A railway conductor cannot be required by a passenger to deviate from his train-orders on the latter's statement of an alleged agreement with the company conflicting therewith. Every one is bound to know that a railway conductor has no general power to run his train except in conformity to the schedule. A passenger wrongfully on a railway train can recover no damages for his removal and exclusion therefrom, except for needless violence. He cannot complain of an indignity which it was his duty to avoid, and which he was bound to expect. A railway company has power, subject to liability for damages for any breach of contract involved, to determine for itself what trains shall stop at particular places."¹

¹ Where plaintiff alleges in a single count that he purchased a ticket from the agent of the defendant railroad company, got on the wrong train by the mistaken direction of the defendant's agents, and was forcibly ejected from the cars by the conductor before reaching his destination, while the proof shows that he left the train voluntarily, without any violence or rudeness on the part of the conductor who had told him that the train was forbidden to stop at his destination, — a recovery may be had for the actual damages sustained or caused by the mistake of the agent in pointing out the wrong train, although no wrongful conduct on the part of the conductor is shown. *Alabama, &c. R. Co. v. Heddleston*, 82 Ala. 218. Where a passenger gets on a train and pays fare to a certain station on the road, and afterwards, before the journey is completed, the conductor tells him that the train will not go to that point, and that he can either get off there or go on to some other point, whereupon he leaves the train, he has a right of action for damages against the company. But in such a case, if the conductor tenders back the fare for

the uncompleted portion of the journey, and it is accepted, the right of action is waived. *Florida Southern R. Co. v. Katz*, 23 Fla. 139. A passenger on a mixed train, having presented his ticket received a check showing his right to a first-class passage to a certain station. At an intermediate station a fast express passed the mixed train, and the conductor of the latter told all his passengers that his check would be received for passage on the express, and the brakeman also having announced the express and told passengers to get aboard it; passenger did get aboard it, but was ejected at the next station for refusing to pay fare, his check being refused. The court held that the expulsion was wrongful, and that damages might be recovered for it, though the check given by the conductor of the mixed train was merely his private mark, and used for his own convenience, and though the rules of the company, about which passenger had not inquired, did not allow passengers on the "mixed" train to be transferred to the express. *Toledo, &c. R. Co. v. McDonough*, 53 Ind. 290.

SEC. 356. **Failure to stop at Station.**—In an action against a railway company for failing to stop a train and allow a passenger to alight at a station for which he had purchased a ticket, where the evidence tended to show that the defendant ran two daily trains that stopped at the station for which the passenger held the ticket, and also ran a through train which, by the company's rules, was not allowed to stop at that station, and that when the ticket was taken up by the conductor he informed the plaintiff that he must get off at a station before reaching the one for which he held the ticket, or go to the next station beyond, and that the plaintiff voluntarily went on to the station beyond, it was held erroneous to instruct the jury that if the plaintiff purchased his ticket for the station at which he wished to stop he had a right to enter the first train due after he purchased the ticket, unless he was informed, before he entered the train, that it would not stop at the station for which the ticket was purchased. If a person purchases a ticket for a certain station, and expressly for a particular train, and at the time of the purchase he is informed by the agent that the train will stop at that station, he will have a right to take passage on such train, and it will be the duty of the company to allow him to leave the train at that station.¹ But a passenger must take notice of the published rules of a railway company. He is not entitled to damages if he takes a train which, by such rules, does not stop at the station to which he desires to go.² The words "good on passenger trains only," contained on a ticket issued and sold by a railway company to a passenger, do not amount to a contract that *all* of its passenger trains will stop at the stations designated on the ticket. In an action by the passenger, against the company, to recover damages for carrying him beyond his destination named on the ticket, the complaint should aver that the train on which he was so carried was one which, under the regulations of the company, should have stopped at the station.³ In a Missouri case,⁴ an action was brought against a railroad company for failing to carry the plaintiff to its original depot. It appeared that the company had abandoned its old depot for one a half-mile short of that terminus. It was held that although the change had been adopted only a few weeks prior to his purchase of the ticket, yet the running of the trains having been uniformly to the new depot

¹ Pittsburgh, &c. R. Co. v. Nuzum, 50 Ind. 141; 19 Am. Rep. 703.

² Trotlinger v. East Tenn., &c. R. Co., 11 Lea (Tenn.), 533.

³ Ohio, &c. R. Co. v. Swarthout, 67 Ind. 567; 33 Am. Rep. 104.

⁴ Martindale v. Kansas City, &c. R. Co., 60 Mo. 508.

since, that change would be considered as a usage of the company, in reference to which the plaintiff must be held to have contracted; that *a fortiori* such is the case where the plaintiff knew of the change at the time of procuring his ticket.¹

SEC. 357. Conductor's Check. — A conductor's check, given to a traveller in lieu of one of several coupons attached to his ticket, is a full equivalent therefor, and if the traveller fails to produce it to another conductor, on a demand made before the distance for which the check is good has been travelled, and refuses to pay his fare, he may lawfully be ejected.²

In an action for a wrongful expulsion, the plaintiff insisted that he had purchased a ticket to a certain station which the conductor took up before reaching the same, while the conductor maintained that the ticket called for passage only to the station where plaintiff was put off. The trial court instructed the jury that, as a matter of law, it was the duty of the conductor in taking up the ticket to give back a check, or punch the ticket and allow plaintiff to hold it until all intermediate stations were passed. It was held on appeal to the Supreme Court that this was error; that the law imposes no such duty, and if it did, the neglect to do so could work no injury as the plaintiff was entitled, notwithstanding, to be carried to the station to which he paid his fare, and that by his not demanding a check on surrendering his ticket, the point could not arise.³ It is plain, however, that if the conductor on taking up a ticket, fails to give the passenger a check or other evidence of his right to a passage, and the passenger is expelled by a subsequent conductor, the company is liable in damages for a wrongful expulsion.⁴

¹ If trains have been accustomed to stop at flag stations when signalled, in order to take on passengers, or to stop at such places when requested by a passenger desiring to get off there, the company is liable for a failure to stop on a signal or request being made. *Freeman v. Detroit, &c. R. Co.*, 65 Mich. 577; 32 N. W. Rep. 833; *Hull v. East Line, &c. R. Co.*, 66 Tex. 619; 2 S. W. Rep. 831.

² *Jerome v. Smith*, 48 Vt. 230. But see *Chicago, &c. R. Co. v. Griffin*, 68 Ill. 499.

³ *Chicago, &c. R. Co. v. Griffin*, 68 Ill. 499. If, however, the conductor does give the passenger a check on taking up his ticket, such check takes the place of the ticket for all purposes, and on demand the

passenger must produce it or pay fare. Thus, in a Vermont case, the conductor on taking up the passenger's ticket gave him a check as evidence of his right to passage to a certain station; before that station was reached a new conductor took charge of the train, and when he demanded of the passenger his ticket or his check, passenger discovered that he had misplaced it, and it could not be found. Upon his refusal to pay fare he was expelled. The court held that the expulsion was justifiable and that no action was maintainable. The case was the same as where passenger loses his ticket. *Jerome v. Smith*, 48 Vt. 230.

⁴ *Pittsburgh, &c. R. Co. v. Henigh*,

But, in New Hampshire, it is held that a passenger may rightfully refuse to surrender his ticket except upon the conductor's tending him a check as evidence of his right of passage.¹ And it appears to us that this is a more reasonable view than that of the Illinois Court as before stated. The agents and officials of the road have no right to insist on the passenger's taking any chances as to the recognition of his right to passage. His right ought not to be made to hang upon the conductor's memory.

SEC. 358. Rates of Fare. — Unless prohibited from doing so by statute, there seems to be no good reason why a railway company, which has established uniform and reasonable rates of fares at which all may purchase tickets, may not for special reasons sell certain persons tickets at a less rate. So long as it may issue passes and transport persons free, if it choose to do so, there seems to be no valid reasons why it may not sell a person a ticket for half-price, without incurring any liability therefor to others. And this is held to be the rule even where the statute provides that all persons shall be given reasonable and equal terms. Thus, in a Massachusetts case,² the defendant road charged A., a student, for a season-ticket between certain stations, a reasonable price, and then sold to B., C., and D., also students, season-tickets between the same stations for half the price charged A., for special reasons which did not appear. A statute required every railroad to give to all persons reasonable and equal terms, and provided that reduced rates for a specific distance might be charged. It was held that this was not a violation of the statute, and A. had no cause of action. The court said: "We are of opinion that as the defendant exacted from the plaintiff only the regularly established price for the season-ticket which he bought, and as there

39 Ind. 509; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Townsend v. N. Y. Cent. R. Co.*, 56 N. Y. 299; 15 Am. Rep. 419 (punitive damages not allowed); *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465. In *Palmer v. Charlotte R. Co.*, 3 S. C. 580, the passenger had a ticket which entitled him to stop over at Columbia; the conductor took it up and gave him a check that did not show any right to stop over. He stopped over, and on presenting the check on the next train and refusing to pay fare was expelled. The court held that the expulsion was wrongful; the conductor had no right to take up the ticket

unless he placed the passenger in as good condition as he was before by giving him a check evidencing all the rights he held under his original ticket. The same view is taken in *Townsend v. New York Cent. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419, which involved similar facts, except that conductor gave passenger no check at all. In such cases, however, only compensatory damages are recoverable. Compare *Cleveland, &c. R. Co. v. Bartram*, 11 Ohio St. 457.

¹ *State v. Thompson*, 20 N. H. 250.

² *Spofford v. Boston, &c. R. Co.*, 128 Mass. 326.

is no evidence that the price was unreasonable, the fact that for special reasons, which do not appear, the president of the defendant permitted certain individuals, students like the plaintiff, more than twenty years old, to buy like tickets for half that price, did not constitute a violation of the statute, nor give the plaintiff a cause of action against the defendant."¹

SEC. 359. **Through Tickets, Effect of.**—In England,² and in some of the States of this country, it is held that where one line of railway sells through tickets to a point beyond its own line of road, and checks the passenger's baggage to such point, and collects fare for the whole route (as is always done in the sale of through tickets), it thereby becomes liable for any injury received by the passenger in respect of his baggage, whether the injury or loss occurred upon its own line or not.³ There is no doubt that a carrier may contract to

¹ A similar conclusion is reached in *Johnson v. Pensacola, &c. R. Co.*, 16 Fla. 623; 26 Am. Rep. 731. This question arises principally in connection with freight rates, concerning which see, *ante*, §§ 202, 203.

² *Great Western Ry. Co. v. Blake*, 7 H. & N. 987; *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549; *Bristol & Exeter Ry. Co. v. Collins*, 7 H. L. Cas. 194. This last case was one involving the carriage of goods entirely. In the first two cases the initial carrier contracted to carry the passenger to a point on a connecting line, *running its own coaches the whole distance*. In the course of the journey, and while the defendant's coaches in which passenger was being carried were running on the tracks of the connecting line, an accident occurred. In an action against the initial carrier the court very properly held that the defendant was responsible for the condition of all the tracks over which it ran its trains, and was also liable to defendant for any negligence on its part in the course of the journey. But these cases manifestly cannot be cited (though they sometimes are) as authority for the general proposition that the initial carrier is liable for any personal injury to the passenger occurring in the course of journey, while passenger is on a connecting line, in the coaches and under the care of another company.

³ *Atchison, &c. R. Co. v. Roach*, 35

Kan. 740; 57 Am. Rep. 199; 27 Am. & Eng. R. Cas. 257; *Baltimore, &c. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617; 3 Am. & Eng. R. Cas. 246; *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 38; 42 Am. Rep. 654; 16 Am. & Eng. R. Cas. 48 (*compare* *Sprayberry* case in 8 Baxt. 341); *Candee v. Penn. R. Co.*, 21 Wis. 582; 94 Am. Dec. 566; *Croft v. B. & C. R. Co.*, 1 McArthur (D. C.), 492. But this is held subject to the provision that the first carrier also sold the through ticket upon which the passenger makes the journey.

In the case of *Wilson v. Chesapeake & Ohio R. Co.*, 21 Gratt. (Va.) 654, the passenger bought at Richmond, of the defendant company, a through ticket to the White Sulphur Springs. Her route lay over defendant's road to its terminus, thence by a stage line to the springs. The ticket expressly stated on its face that each company should be liable only for losses on its own line, but there was no proof that this stipulation was brought to passenger's notice. Arriving at the terminus of the railroad, passenger stopped over night and had her baggage sent up to her room in the hotel. The next day she resumed her journey by the stage line, having, before leaving the hotel, committed her baggage to the agent of the stage line. It was lost and she brought an action against the railroad company. The court sustained the action, holding that the

assume responsibility both for the passenger and his baggage over all connecting lines until his destination is reached;¹ the question therefore is one of the construction of the contract of carriage. But the assumption of such unusual responsibility on the part of the carrier is not to be easily presumed; the proof of it must be clear and convincing. And we think it may safely be said that, according to the great weight of authority in this country, a railway company selling through tickets, involving a passage over its own line and connecting lines, is, as to personal injuries, responsible only for those occurring upon its own line;² and as to baggage checked through, is

initial carrier was liable for losses occurring on a connecting line in the absence of a special contract or of a regulation which was brought to the passenger's notice. This case, however, is clearly opposed to the better authority on the subject. See the latter part of this section. The mere circumstance that a carrier gives a through check is not sufficient to establish his liability beyond his own line, unless it is also shown that he issued a through ticket. Thus, in *Green v. New York, &c. R. Co.*, 12 Abb. (N. Y.) Pr. N. s. 473, the defendant railroad issued to the plaintiff a check for baggage to the terminus of his journey, which covered its own line and a steamboat line which ran in connection therewith; but it did not issue a ticket to the passenger beyond its own line, and it was held that it could not be held liable for the loss of the baggage by the steamboat company. But if a passenger takes his baggage in the car with him over the first line, but procures it to be checked and carried in the baggage-car over the second, the first line cannot be held chargeable for the loss of the baggage, because it never had it in its custody. *Straiton v. N. Y., &c. R. Co.*, 2 E. D. S. (N. Y. C. P.) 184. But if the company checked the baggage in the first instance, the fact that the passenger procured it to be re-checked over another line is said not to defeat the liability of the company issuing the first check. *Candee v. Penn. R. Co.*, 21 Wis. 582; *Mobile, &c. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607. See, holding that the sale of a through ticket and checking baggage through renders the first carrier liable for the whole trip, *Major v. Boston, &c. R. Co.*, 7 Allen

(Mass.), 320; *Burnell v. N. Y. Central R. Co.*, 45 N. Y. 184; *Illinois Central R. Co. v. Copeland*, 24 Ill. 332 (such liability created by contract); *Weed v. Saratoga, &c. R. Co.*, 19 Wend. (N. Y.) 534; *Torpey v. Williamson*, 3 Daly (N. Y.), 162; *Carey v. Cleveland, &c. R. Co.*, 29 Barb. (N. Y.) 35; *Burnell v. N. Y. Cent. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61.

¹ *Knight v. Portland, &c. R. Co.*, 56 Me. 234; 96 Am. Dec. 450; *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 38; 42 Am. Rep. 654; *Illinois, &c. R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749; *Nashville, &c. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; 35 Am. Rep. 705. See, *ante*, § 190. As a matter of fact the contract as expressed on the ticket now invariably provides that in selling the ticket the initial carrier acts as agent of the others. See *Penn. Cent. R. Co. v. Schwarzenberger*, 44 Penn. St. 208.

² *Nashville, &c. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; 35 Am. Rep. 705; *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 474. In *Harlan v. Eastern R. Co.*, 114 Mass. 44, and in *Knight v. Portland R. Co.*, 56 Me. 234; 96 Am. Dec. 450, the court held that the sale of a ticket for a gross sum, composed of coupons, invalid if detached, and each bearing the name of the railroad corporation selling it, empowering the purchaser to pass over the connecting roads of different corporations, does not make the selling corporation liable to the purchaser for an injury received upon a connecting road; but in these, as well as in *Nashville, &c. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341, and other cases, that the company may by contract, either express or implied, bind itself to be

*exonerated from all further liability in respect to it, when it has delivered it into the custody of the proper connecting line.*¹ The company selling

responsible for the entire route. But it is difficult to conceive how they can impliedly be held to have so contracted, unless the issue of a single ticket for the entire route is to be regarded as raising such an inference. It was, however, held in *Hood v. New York, &c. R. Co.*, 22 Conn. 1, 501, that such a contract could not be inferred from the issue of such a ticket, since the company had no power to enter into a contract of that kind. See, *ante*, § 190. In *Poole v. Delaware, &c. R. Co.*, 35 Hun (N. Y.), 29, the defendant, which ran trains from Oswego to Fulton station, entered into an agreement with one Hatch, who ran an omnibus from Fulton station to Fulton village, distant about a mile therefrom, by which the defendant's agent, at Oswego, sold tickets to Fulton village, and Hatch sold tickets at the village to Oswego; the fare charged for the whole distance being the sum of the two separate fares, and each party accounted to the other for the fares received by it. The tickets were on separate cards; one a railroad ticket from Oswego to Fulton, the other an omnibus ticket from the station to the village. The plaintiff having purchased tickets at Oswego for the village, and having been injured while going in the omnibus from the station to the village through the negligence of the driver, brought this action to recover the damages thereby sustained against the railroad company. It was held that it could not be maintained. The court said: "The separate tickets delivered to the plaintiff, whether regarded as contracts or tokens, are insufficient evidence to justify the conclusion as a matter of law, or of fact, that the defendant contracted to carry the plaintiff beyond Fulton station." See *Hood v. New York, &c. R. Co.*, 22 Conn. 1 (an exactly similar case).

¹ In *Milnor v. New York, &c. R. Co.*, 53 N. Y. 363; 5 Am. Ry. Rep. 381, the defendant issued coupon tickets, and checked the plaintiff's baggage over a connecting road. The baggage was burned while in the custody of the connecting road, and it was held that the tickets and check were insufficient evidence to authorize the con-

clusion that the defendant contracted to carry over the connecting road. In *Kessler v. N. Y. Central R. Co.*, 61 N. Y. 538, the plaintiff purchased a coupon-ticket from the Baltimore & Ohio Railroad at Washington, for Buffalo, the last part of her route lying over the defendant's road, and checked her baggage through, which was never delivered. The plaintiff failed to show that the baggage came into the possession of the defendants, and it was held against defendant that the tickets and checks were insufficient evidence to justify the conclusion that the connecting roads were liable as joint contractors, though the checks were stamped with the names of all the lines. In *Isaacson v. N. Y. Cent. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188, it was held that a check upon baggage through to New Orleans was evidence of a contract to safely deliver to a connecting road, but not evidence of a contract to deliver at New Orleans. But in this case, as the passenger's ticket which was shown to the defendant's baggage-master when he checked the baggage, took him over what is called the *Mobile* route, while the baggage was checked over and delivered to the *Jackson* route, and as the baggage was not delivered by the defendant to the proper connecting carrier at the end of his route, it was held that it was liable for the loss; and there is no reason for questioning the soundness of this doctrine. See *Burnell v. N. Y. Cent. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 66, when the first carrier was held liable as warehouseman after baggage had reached its destination and had been stored by the last carrier. See also *Myrich v. Mich. Central R. Co.*, 107 U. S. 102; *Burrough v. Norwich, &c. R. Co.*, 100 Mass. 26; 1 Am. Rep. 78. Section 2084 of the Georgia code provided that the last one of connecting lines of railroads over which goods are shipped, which receives them as in good order, is liable to the consignee, is held not to apply to baggage of a passenger checked and accompanying him on his passage. The rule is said to be that if passenger's baggage is delivered to him in bad order he may sue either the first car-

the ticket is treated merely as the agent of the connecting lines; and this is the case whether a single ticket, or a ticket with coupons for each road, is issued.¹ Each company throughout the route is a principal and liable as a common carrier on its own road, but no further.² Indeed, it appears to us that nothing is more unreasonable than to attempt to hold the initial carrier liable for a personal injury to the passenger received on a connecting line. None of the reasons which demand such liability in the case of baggage can apply to such injuries, and the attempt to thrust such an extraordinary liability upon initial carriers has been very justly rebuked in all the cases which have arisen.³ The English cases which are sometimes

rier, or the last. It seems, however, that in either case, certainly so where the last carrier is sued, any company may exonerate itself by showing that it delivered the baggage to the connecting carrier or to the owner in exactly the same state as that in which it received it. *Wolf v. Central R. Co.*, 68 Ga. 653; 45 Am. Rep. 501; *Hawley v. Scrivens*, 62 Ga. 347; 35 Am. Rep. 126; *Savannah, &c. R. Co. v. M'Intosh*, 73 Ga. 532; 27 Am. & Eng. R. Cas. 269; *East Tenn., &c. R. Co. v. Montgomery*, 44 Ga. 278.

¹ See *Hood v. N. Y. &c. R. Co.*, 22 Conn. 1, 501. Where a through ticket is issued for a journey over several roads, the company selling the ticket acts as the agent of the others, and they are respectively liable for any mistake made by him in selling it. *Young v. Pennsylvania R. Co.*, 115 Penn. St. 112; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358. In some of the cases a distinction seems to be made between the issue of a single ticket and of coupon-tickets. *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 38; 42 Am. Rep. 654. But it is difficult to perceive how the form of the ticket in this respect can make any difference. The ticket is not a contract, but merely *prima facie* evidence of a contract, and of the payment of the sum required for the passage. The real contract is left open to proof, and in ascertaining the intention of the parties, regard is to be had to the circumstances; and when it is shown that several distinct lines of railway intervene on the route, can it reasonably be presumed that the first carrier intended to assume liability for the acts of the others over whose trains, appliances, or

servants it has no control? Even if such a presumption did arise, would it not at once be overcome by proof that the first carrier sold the ticket as the agent of the successive carriers? Again, the custom of railway companies to sell tickets in this manner has become so uniform, so general and notorious, that even the courts are bound to take notice of it, and it is an exceedingly harsh rule which would hold, in the face of such a general custom, that the first carrier selling the ticket is liable for the misconduct of subsequent carriers.

² *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; 18 Am. & Eng. R. Cas. 339; *Penn. Cent. R. Co. v. Schwarzenberger*, 45 Penn. St. 208; *Felder v. Columbia, &c. R. Co.*, 21 S. C. 35; 27 Am. & Eng. R. Cas. 264; *Central Trust Co. v. Wabash, &c. R. Co.*, 31 Fed. Rep. 247; 31 Am. & Eng. R. Cas. 103; *Fowles v. Great Western R. Co.*, 7 Exch. 699. A person riding on a coupon which expressly limits the liability of the first carrier to injuries occurring on its own line cannot recover for injuries received on a connecting line, whatever may be the rule under other conditions. *Kerigan v. Southern Pac. R. Co.*, 81 Cal. 248; 41 Am. & Eng. R. Cas. 28.

³ *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; 18 Am. & Eng. R. Cas. 33. "It is well settled that through railroad tickets, in the form of coupons, entitling the holder to pass over several roads, usually import no contract with the company selling the same to carry such person beyond the line of its own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others,

cited as authority for such a doctrine all apply to cases in which the initial carrier carried the passenger over the whole route in its own carriages, having running powers over the connecting lines, and the courts have very properly held that in such a case it is liable to the passenger for any injuries resulting to him while being carried by it.¹

In some of the States, it is held that the first carrier, selling a through ticket, is not liable for an injury to the passenger upon a connecting line, *but is liable for the loss of his baggage* by a connecting line.² This view has sometimes been attacked as involving a palpable inconsistency, as presupposing the existence of two separate contracts, — one for the carriage of the passenger, the other for the carriage of his baggage.³ But we think there is no inconsistency whatever in such a view. There are two separate and distinct contracts, — contracts which arise not merely by acts of the parties but by operation of law. The negotiations, whatever they may be, by which the parties establish between themselves the relation of passenger and carrier, create two undertakings on the part of the carrier, — one to exercise the utmost care in the conduct of its trains to carry the passenger safely, the other to *insure the safe delivery of his baggage*; and it seems to us there is no principle violated in holding that the one undertaking is, from its very nature, confined to the carrier's own line, while the other may fairly be construed as extending throughout the whole journey. Again, in suing for a personal injury the passenger does not sue on the contract of carriage, but *for the tort*, — for the tortious breach of a public duty owing to him; and though this public duty arises out of the contract of carriage aided by the implication of law, the passenger's action is for a tort, and he can in reason only hold the company committing it liable; he cannot attempt to make the initial carrier responsible for the torts of a company with which it has merely a remote connec-

so far as the passenger is concerned." *Young v. Pennsylvania R. Co.*, 115 Penn. St. 118, citing 2 Redfield on Ry's (4th ed.), 276.

¹ *Bristol, &c. Ry. Co. v. Collins*, 7 H. L. Cas. 194; *Burton v. Northeastern Ry. Co.*, L. R. 3 Q. B. 549.

² *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 38; 42 Am. Rep. 654; *Nashville, &c. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; 35 Am. Rep. 705; *Fursten-*

heim v. Memphis, &c. R. Co., 9 Heisk. (Tenn.) 238.

³ In the first edition of this book Mr. Wood strongly condemned such a view. On page 1421, after commenting on the Tennessee decisions as involving a clear contradiction, he went on to say, "we believe that the reasoning of the [Tennessee] court in this case will fail to commend it to the courts, as expressing a sound, just, or reasonable doctrine."

tion. On the other hand, in an action for injury to his baggage the passenger sues *on the contract entirely*, for a breach of the carrier's contract insuring the safe delivery of his baggage.¹

There is no question that any one of the connecting lines is liable for baggage lost or injured where the injury occurred on its line.²

¹ *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 56; 42 Am. Rep. 654. "The reason," says the court, "is obvious. There can never be any doubt as to the carrier by whose fault the passenger is injured, or the personal contract with him violated. While, on the other hand, there may be the same difficulty in ascertaining the carrier at fault in regard to baggage as in the case of ordinary freight." The distinction is recognized in *Hood v. N. Y., &c. R. Co.*, 22 Conn. 14. And in *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424, the court, by REDFIELD, J., say: "But in regard to carrying passengers the rule is different, we apprehend. These through tickets, in the form of coupons for each successive company, which are purchased of the first company, import no contract ordinarily to carry the passenger beyond the line of the first company, so far at least as they are concerned. The baggage of passengers may come under the same rule in regard to conveying beyond the first company's line which freight does, as the same general liability exists. But through passenger-tickets are to be regarded as distinct tickets for each road, and unless the road check baggage through, it is questionable, perhaps, how far they are liable for losses beyond their own limits. And the contract between the companies which commonly exists in regard to the division of the price of the through ticket constitutes no such partnership, probably, as will render each company liable for the whole route. The first company is in such case looked upon as the agent of the other companies for selling their tickets, and the contract requires no different construction from one where the tickets of one company are sold at the stations of other companies. We do not perceive that this rule of liability could make the carrier of passengers liable for the act of a party over whom he has no control. . . . He cannot be regarded as liable, we think, for all the acts of all the operatives of the

companies over whose lines he carries the plaintiff, unless some connection between the roads of a character similar to that of general partnership, or the consolidation of their interests in the carrying business is shown." In *Straiton v. New York, &c. R. Co.*, 2 E. D. Smith (N. Y.), 184, the same was held as to the loss of baggage retained by the plaintiff in his own custody until he arrived at the defendant's terminus. The court said: "There is nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage so as to render the defendant liable in common with the others for the loss of this valise. The arrangement may be beneficial to them as well as to the public, inasmuch as by facilitating travel it may tend to increase it; but that would not create that joint interest, that community in profit and loss, which is essential to the existence of a partnership." Distinguishing *Champion v. Bostwick*, 18 Wend. (N. Y.) 175. In *Knight v. Portland, &c. R. Co.*, 56 Me. 234, 96 Am. Dec. 450, it was held that such through tickets are to be regarded as to passengers, "as distinct tickets for each road, sold by the first company as agent for the other companies." *Hartan v. Eastern R. Co.*, 114 Mass. 44. The same doctrine was held in *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222. The court said: "There is a general understanding between the different railroads in the country which connect together, as to their times of arrival and departure, and the routes are frequently advertising as forming one line; but so long as they continue disconnected as to the profits and losses of transportation, and each has or bears its own, there is no partnership, and neither is responsible for the engagements of the other. . . . They had, it is true, the same agent, but he acted in his vicarious capacity separately for each."

² *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.), 181 (last line held

And in view of the fact that it is practically impossible for the passenger to prove on what line the injury occurred the rule is recognized that the burden of proof lies upon the company against whom the action is brought to show that the loss did not occur on its line.¹ There is no undue harshness in this rule since it lies peculiarly within the power of every company to exonerate itself by showing that it delivered the baggage to the next carrier, or to the owner, in exactly the same condition in which it received it. In the absence of such proof any company over whose line the baggage passed, is liable in an action against it. And it seems to us that on principle this is the doctrine which should be followed; a necessary consequence of its adoption would be the recognition of the rule already established by the weight of authority, — that no carrier would be liable for any loss occurring beyond its own lines unless it had specially contracted to assume such liability.² But while the initial carrier cannot be considered as undertaking to insure the safety of the passenger from injuries resulting from the negligence of connecting carriers, it does undertake that the ticket which it sells will be recognized by the connecting companies over whose lines it calls for passage, and that the passenger shall have a *passage*, safe or unsafe, to his destination. It is always liable, therefore, where a connecting carrier refuses to recognize the ticket sold to the passenger, and refuses to carry him.³ But an injury of this kind is purely *ex contractu*, and is clearly distinguishable from the cases where the suit is *ex delicto* for an injury to the person.

It is to be observed also, both as regards the passenger and his baggage, the initial carrier is liable over the whole route where it forms, with the connecting lines, one continuous system, though nominally they are separate roads; in such a case the companies are in the relation of partners, and each acts as the agent of the other.⁴

liable on proof that baggage was delivered to it in good condition); Chicago, &c. R. Co. v. Fahey, 52 Ill. 81; Atchison, &c. R. Co. v. Roach, 35 Kan. 740; 27 Am. & Eng. R. Cas. 257; Railroad Co. v. Stockard, 11 Heisk. (Tenn.) 568.

¹ In Lee Lin v. Terre Haute, &c. R. Co., 10 Mo. App. 125, a company sold a through ticket and checked passenger's baggage to its destination. When it was delivered to him by the last carrier, the lock had been broken and a part of the contents of the trunk stolen. It was held

that the last carrier was liable unless it could show that it delivered the baggage in the same condition as it received it.

² See Central Trust Co. v. Wabash, &c. R. Co., 31 Fed. Rep. 247.

³ Central R. Co. v. Combs, 70 Ga. 533; 48 Am. Rep. 582; Carter v. Peck, 4 Sneed (Tenn.), 203; 67 Am. Dec. 604.

⁴ Peterson v. Chicago, &c. R. Co., 80 Iowa, 92; Barter v. Wheeler, 49 N. H. 9; 6 Am. Rep. 434; Hart v. Rensselaer, &c. R. Co., 8 N. Y. 37; 59 Am. Dec. 447; Texas, &c. R. Co. v. Fort and Ferguson

The New York courts seem to maintain a doctrine that is both sensible and just, and maintains the proper connection between the contract for the carriage of the passenger and his baggage.¹ In the

(Tex. 1882), 9 Am. & Eng. R. Cas. 392, 395. A sale of a through ticket is no evidence of such a partnership, and creates of itself no joint liability. *Felder v. Columbia, &c. R. Co.*, 21 S. C. 35; 27 Am. & Eng. R. Cas. 264. See also in this connection *Gass v. New York, &c. R. Co.*, 99 Mass. 220; 96 Am. Dec. 742.

¹ *Isaacson v. New York Central R. Co.*, 94 N. Y. 278; 46 Am. Rep. 142; 16 Am. & Eng. R. Cas. 188; *Milnor v. N. Y., &c. R. Co.*, 53 N. Y. 363. This was an action for loss of baggage. The baggage was checked by defendant with a check of the connecting company, and a coupon-ticket was issued. The baggage was destroyed while in possession of the second company. It was held that defendant was not liable. See *Kessler v. N. Y. Central R. Co.*, 61 N. Y. 538, where the last carrier was held not liable, there being no proof that the baggage had come into its possession. In *Croft v. B. & C. R. Co.*, 1 McArthur (D. C.), 492, the first carrier, receiving through fare and checking baggage through, was held liable for the loss of the baggage on any of the connecting lines. *Illinois Central R. Co. v. Copeland*, 24 Ill. 332. This is founded on the English doctrine relative to goods. There were three tickets, all headed in the defendant's name, — the first from Chicago to St. Louis, and the second from Chicago to Mattoon; all recited the payment of fare to defendant, and the only indication of the intervention of any other company was the use of the words "*via the Terre Haute & Alton Railroad*," on the third ticket from Mattoon. The check was stamped "Chicago to St. Louis." The court say this implies a special undertaking of the defendant to carry from Chicago to St. Louis. This seems to come within the rule of the English cases of through tickets hereafter cited, and of *Quimby v. Vanderbilt*, *infra*. The court said that the guaranty evidenced by the tickets and check was one of safe carriage of person and baggage by the defendant from Chicago to St. Louis, the latter place "by means of our connection

with the Terre Haute and Alton Railroad," being "the terminus of our road." "You having no farther care or concern about it whether we run our own cars through, or take those of the other road at the point of intersection." In *Chicago, &c. R. Co. v. Fahey*, 52 Ill. 81, 4 Am. Rep. 587, it was held that such an action as the last could be maintained against any company of the connecting line on whose line the baggage is shown to have been lost. In *Quimby v. Vanderbilt*, 17 N. Y. 306, the defendant owned steamships plying between New York and Nicaragua, but he advertised "Vanderbilt's line between New York and San Francisco," the advertisements being signed by his agent; and this agent sold three tickets, — one from New York to Nicaragua, one thence across the isthmus, and one thence on a particular vessel to San Francisco, — for a gross sum, delivering with them a card signed by him and describing the route, and stating that passengers were speedily conveyed across the isthmus by the Nicaragua transit. It was held that this authorized a finding of a contract by defendant, as principal, for through transportation. This was founded on English cases. In *Champion v. Bostwick*, 18 Wend. (N. Y.) 175, three persons ran a line of coaches from Utica to Rochester, the route being divided among them into three sections, the occupant of each section furnishing his own vehicles and horses, furnishing drivers, and paying the expenses of his section, but fares for passage were divided among them in proportion to the number of miles run by each. It was held that they were jointly liable for an injury to a passenger by the negligence of one. The chancellor distinguished such a case as the principal case. In *Baltimore, &c. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617, it was held that where it is necessary for a traveller in going from one place to another to pass over the connecting lines of several railroad companies, it is competent for either company to contract with him for the transportation of himself and

case first cited in the last note, ANDREWS, J., says: "It will be useful in determining the principal question, to refer to the obligation which a carrier of passengers by rail assumes on the sale of a passage-ticket in respect to the personal baggage of the passenger. The carriage of the baggage of the passenger under reasonable limitations as to amount is the ordinary incident to the carriage of the passenger, *and the duty arises on the part of the company as incident to the principal contract*, without any specific agreement or separate compensation. . . . There arises, therefore, on the sale of a passenger-ticket, a contract to carry the person and the baggage of the passenger between the points indicated, *on the road of the company issuing it, and to deliver the baggage at the end of the route, to the passenger or his duly authorized agent.*" In this case, the defendant was held liable for the loss of the baggage, because at the end of its route it delivered it to the wrong carrier; 'but under the decision, if it had delivered it to the right connecting carrier, its liability would have ended; and this seems to be the only doctrine which can be supported either upon principle or any accurate line of reasoning.¹

SEC. 360. Right to Charge Extra Fare where Tickets are not Purchased.—A rule of a railroad company requiring passengers who ride on freight trains or any other train to procure tickets before getting on such trains is reasonable; and posting it conspicuously in all the passenger-stations and caboose-cars on the road for more than a month is sufficient notice to the public to justify the company in ejecting a passenger without a ticket from a freight train that has commenced its journey, even though such passenger has no actual notice of the rule, and offers to pay his fare. The authorities are generally in accord as to the right of a railroad company to make, and in a proper manner to enforce a rule or regulation to carry passengers on its freight trains, either not at all, or only upon the condition that they are provided with tickets, and prohibiting the collection of fare by conductors of such trains.² The point on

baggage the whole distance, or that its liability shall be confined to loss or damage occurring on its own road; but the collection by such contracting carrier of fare in advance for the entire journey, without agreement as to risks, renders it liable, on receipt of such traveller's baggage, to transport it safely to the end of the route, and there deliver it, on demand, to such owner. This was held without extended considera-

tion, upon the authority of the text-book writers, Schouler, Thompson, Lawson, and Hutchinson.

¹ Isaacson v. N. Y. Central R. Co., 94 N. Y. 278; 46 Am. Rep. 142; 16 Am. & Eng. R. Cas. 188. See a similar rule upheld in Central Trust Co. v. Wabash & R. Co., 31 Fed. Rep. 247.

² Chicago & Alton R. Co. v. Flagg, 43 Ill. 364; Arnold v. Illinois Central R. Co.,

which they are not harmonious is as to the manner of its enforcement, some courts holding that actual notice of the rule must be brought home to the passenger before the train leaves the station, in order to justify his expulsion therefrom, for want of a ticket, at any other than the regular stopping-place;¹ while others, with better reason, only require a suitable general notice to the public for such length of time before the rule is to be put in operation as to make it reasonably certain that all passengers in the exercise of due diligence must become aware of it, and hold that the right of expulsion for non-compliance with the requirement may be exercised in any suitable place, under all the circumstances of the particular case.²

There is now no question that the company may require passengers to pay extra fare if they pay on the train instead of procuring tickets; such a regulation tends to prevent efforts to defraud the company, and has been always upheld as reasonable and proper.³ But in order to enforce a rule for the collection of additional fare when tickets are not purchased, the company must keep open its offices for the sale of tickets to passengers for a reasonable time before the departure of each train, and up to the time fixed by its published rules for its departure, not up to the time of actual departure. Any right of a railroad company to discriminate in its fare, between those purchasing tickets and those who do not, *depends on the fact that a reasonable opportunity has thus been given to obtain tickets at the lowest rate.*⁴ The company is liable in damages, therefore, for the expulsion

83 Ill. 273; *Eaton v. Delaware, &c. R. Co.*, 57 N. Y. 382; 15 Am. Rep. 513; 57 N. Y. 382; *Cleveland, &c. R. Co. v. Bartram*, 11 Ohio St. 457; *Law v. Illinois Central R. Co.*, 32 Iowa, 534; *Pittsburgh, &c. R. Co. v. Vandyne*, 57 Ind. 516. See also *Evans v. Memphis, &c. R. Co.*, 56 Ala. 246; 28 Am. Rep. 771; *St. Louis, &c. R. Co. v. Myrtle*, 51 Ind. 566.

¹ *Illinois Central R. Co. v. Sutton*, 53 Ill. 397.

² *Burlington, &c. R. Co. v. Rose*, 11 Neb. 117; *post*, §§ 362, 363.

³ *Bland v. Southern Pacific R. Co.*, 55 Cal. 570; *Crocker v. New London R. Co.*, 24 Conn. 249; *Chicago, &c. R. Co. v. Roberts*, 40 Ill. 503; *Chicago, &c. R. Co. v. Herring*, 57 Ill. 59; *Chicago, &c. R. Co. v. Parks*, 18 Ill. 460; *Illinois Central R. Co. v. Nelson*, 59 Ill. 110; *Indianapolis, &c. R. Co. v. Rinard*, 46 Ind. 293;

Hoffbauer v. Davenport, &c. R. Co., 52 Iowa, 342; *State v. Chovin*, 7 Iowa, 204; *Wilsey v. Louisville & N. R. Co.*, 83 Ky. 511; *McGowen v. Morgan's, &c. R. Co.*, 41 La. An. 732; *State v. Gould*, 53 Me. 279; *Swan v. Manchester, &c. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; 6 Am. & Eng. R. Cas. 327; *Du Laurans v. St. Paul, &c. R. Co.*, 15 Minn. 29; 2 Am. Rep. 102; *State v. Hungerford*, 39 Minn. 6; *Forsee v. Alabama, &c. R. Co.*, 63 Miss. 67; *Hilliard v. Gould*, 34 N. H. 230; *Cincinnati, &c. R. Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31; *Poole v. Northern Pac. R. Co.*, 16 Oreg. 261; *Reese v. Pennsylvania Co.*, 131 Penn. St. 422.

⁴ *St. Louis, &c. R. Co. v. South*, 43 Ill. 176; *Illinois Central R. Co. v. Cunningham*, 67 Ill. 316; *Jeffersonville, &c. R. Co. v. Rogers*, 28 Ind. 11; 38 id. 116;

of a passenger who has had no reasonable opportunity to secure a ticket, and who refuses to pay more than the ticket rate.¹

And even the adoption of a regulation that all persons who travel on a freight train shall procure a ticket before entering the cars, imposes upon the company the duty of having the ticket-office open a sufficient length of time before the departure of the train to enable passengers to procure tickets. A person who endeavors to procure a ticket, but is unable to do so in consequence of the absence of the agent, has a right to travel on such train *by paying or offering to pay the usual fare*.² But, where the ticket-office is open so that a passenger can procure a ticket, and he fails to do so, he is bound to pay the additional rate, if it is reasonable; and the fact that he did not arrive at the station in season to do so, before the train left, is no excuse;³ and if he refuses to pay the additional rate, he may be

Pullman Palace Car Co. v. Reed, 75 Ill. 125; Du Laurans v. St. Paul, &c. R. Co., 15 Minn. 49; 2 Am. Rep. 102; Missouri Pac. R. Co. v. McClanahan, 66 Tex. 530; 27 Am. Eng. R. Cas. 82; Southern Kan. R. Co. v. Hinsdale, 38 Kan. 507; 34 Am. & Eng. R. Cas. 256; Gulf, &c. R. Co. v. Fox (Tex.), 33 Am. & Eng. R. Cas. 543; Lane v. East Tenn., &c. R. Co., 5 Lea (Tenn.), 124; St. Louis, &c. R. Co. v. Dalby, 19 Ill. 353; Porter v. N. Y. Central R. Co., 34 Barb. (N. Y.) 353; Nellis v. N. Y. Central R. Co., 30 N. Y. 505; But see Bordeaux v. Erie R. Co., 8 Hun (N. Y.), 579; Chicago, &c. R. Co. v. Flagg, 43 Ill. 364; Illinois Central R. Co. v. Sutton, 42 Ill. 438. See also State v. Hungerford, 39 Minn. 60. What is a reasonable time depends, of course, on the circumstances of each case, and is generally a question for the jury. See Indianapolis, &c. R. Co. v. Kennedy, 77 Ind. 507; 3 Am. & Eng. R. Cas. 467; Everett v. Chicago, &c. R. Co., 69 Iowa, 15; 27 Am. & Eng. R. Cas. 98. If the office is opened a sufficient length of time before the hour for the scheduled departure of the train, it is not necessary that it be kept open until the actual departure of the train. St. Louis, &c. R. Co. v. South, 43 Ill. 176; Swan v. Manchester, &c. R. Co., 132 Mass. 116; 42 Am. Rep. 432; 6 Am. & Eng. R. Cas. 327; Everett v. Chicago, &c. R. Co., 69 Iowa, 15; 27 Am. & Eng. R. Cas. 98. Compare, however, Atchison, &c. R. Co.

v. Dwelle, 44 Kan. 394; 44 Am. & Eng. R. Cas. 402. But it is held that where the statute requires that the ticket-office shall be kept open for "at least one hour prior to the departure of each passenger train from the station," the actual departure of the train is meant. Porter v. N. Y. Central R. Co., 34 Barb. (N. Y.) 353; Nellis v. New York, &c. R. Co., 30 N. Y. 505.

¹ Forsee v. Alabama, &c. R. Co., 63 Miss. 67.

² St. Louis, &c. R. Co. v. Myrtle, 51 Ind. 566. A regulation is not reasonable which, while allowing passengers to travel on freight trains, requires them to have tickets, and no opportunity is afforded passengers for the purchase of tickets except at such hours as would make it more expeditious to travel by the regular passenger trains. Evans v. Memphis, &c. R. Co., 56 Ala. 246; 28 Am. Rep. 771.

³ Hoffbauer v. Davenport, &c. R. Co., 52 Iowa, 342; Bordeaux v. Erie R. Co., 8 Hun (N. Y.), 579; Chicago, &c. R. Co. v. Parks, 18 Ill. 460; Chicago, &c. R. Co. v. Flagg, 43 Ill. 364; Crocker v. New London, &c. R. Co., 24 Conn. 249. In Swan v. Manchester, &c. R. Co., 132 Mass. 116, 42 Am. Rep. 432, the table of prices for fare on a railroad authorized the ticket-seller at D. to make a discount of fifteen cents for passengers who purchased tickets to L., the advertised fare being sixty-five cents. The plaintiff, who desired to take

expelled from the train;¹ and if he pays only from one station to another, he may be compelled to pay the additional rate at each station.² If, however, the passenger has paid the ticket-fare, the conductor must return the amount to him *before* he can lawfully expel him from the train;³ and if the passenger is expelled, *and then* the money is returned to him, the expulsion is unlawful.⁴ No right exists to charge additional fare upon the train, when the ticket-fare equals the amount which, by statute, the company is en-

passage from D. to L., went to the ticket-office after the time for the departure of the train as advertised had expired, but there was sufficient time to purchase if the ticket-seller had been in the office, but he had only remained there up to the advertised time. The plaintiff then took passage without a ticket, and refusing to pay more than the price asked at the ticket-office, was ejected from the train by the conductor, who demanded the full fare. It was held that the ejection was justifiable. The court said: "It has been held in a few cases that the offer to carry passengers at a less rate if tickets were purchased, was in the nature of a proposal, like other proposals to enter into a contract, dependent for its acceptance upon the compliance with its condition; that it might be withdrawn at any time; that closing the office for the sale of tickets was such withdrawal; and that the offer carried with it no obligation on the part of the company to open an office or to keep such office open for any length of time, it being merely an offer to make the deduction if the tickets should be procured. *Crocker v. New London R. Co.*, 24 Conn. 249; *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.), 579. In a much larger number of cases, and with much better reason, it has been held that where the railroad undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets. *St. Louis, &c. R. Co. v. South*, 43 Ill. 176; *Jeffersonville R. Co. v. Rogers*, 38 Ind.

116; *Indianapolis R. Co. v. Rinard*, 46 id. 293; *Du Laurans v. St. Paul R. Co.*, 15 Minn. 49. Adopting on this part of the case the rule most favorable to the plaintiff, he was afforded a fair and reasonable opportunity to obtain a ticket. The delay of the train did not enlarge his rights, nor would it entitle him to insist that at the station whence he was to start, the office of the ticket-seller should not be closed until its arrival. The plaintiff having no right to insist on being carried for the price of a ticket, and declining to pay the regular fare, was properly excluded from the train. The exclusion from the train took place at W., a station between D. and L. While the train was stopping, plaintiff undertook to purchase a ticket from W. to L. for the purpose of continuing his journey on the same train, and tendered the ticket-seller at W. money therefor, which was accepted by the ticket-seller; but he, on learning the circumstances, refused to sell the ticket, and tendered back the money, which plaintiff refused to accept, and the train left W. without plaintiff. It was held that the refusal to sell the ticket was justifiable." *Stone v. Chicago, &c. R. Co.*, 47 Iowa, 82; *O'Brien v. N. Y. Central R. Co.*, 80 N. Y. 236.

¹ *Illinois Central R. Co. v. Nelson*, 59 Ill. 110; *State v. Gould*, 53 Me. 279.

² *Chicago, &c. R. Co. v. Parks*, 18 Ill. 460.

³ *Du Laurans v. St. Paul, &c. R. Co.*, 15 Minn. 49; *Bland v. Southern Pacific R. Co.*, 55 Cal. 570; 36 Am. Rep. 50; *Freidenrich v. Baltimore, &c. R. Co.*, 53 Md. 201.

⁴ *Bland v. Southern Pacific R. Co.*, 55 Cal. 570; 36 Am. Rep. 50.

entitled to charge, and in such case only the ticket-fare need be tendered.¹

The company is bound to sell tickets to all who apply for them provided the applicants are not improper persons to be carried. The sale must be without discrimination, and mandamus may be had to compel the company to sell the petitioner a ticket on the same terms extended to others.²

SEC. 361. **Expulsion of Passengers.** — We have already seen that a railway company may refuse to receive certain classes of persons as passengers ;³ and it is equally true that a person who has entered one of its trains as a passenger may, under certain circumstances, be expelled therefrom, — as, drunken and disorderly persons, or others whose conduct or appearance is such as is calculated to operate as a serious annoyance to other passengers, or is disgusting.⁴ But slight intoxication not seriously affecting the passenger's conduct will not justify expulsion or even a refusal to carry.⁵ The exercise of this right, for such causes however, is always attended with risk to the company, and should never be exercised except where the proof of misconduct, etc., is full and complete. It must always be exercised,

¹ *Smith v. Pittsburgh, &c. R. Co.*, 23 Ohio St. 10.

² *Atwater v. Delaware, &c. R. Co.*, 48 N. J. L. 55. See also *Larrison v. Railroad Co.*, 1 Interst. Com. Comm'n Rep. 147. Compare *Spofford v. Boston, &c. R. Co.*, 128 Mass. 326. A discrimination in favor of drummers or commercial travellers, on the ground that they are supposed to create freight traffic for the road is not justifiable. *Larrison v. Railway Co.*, 1 Interst. Com. Comm'n Rep. 147.

³ It by no means follows that because the company may rightfully refuse to receive a person as carrier it may expel him after the journey has begun. See this adverted to *ante*, § 297 ; *Pearson v. Duane*, 4 Wall. (U. S.) 605.

⁴ *Railway Co. v. Valleley*, 32 Ohio St. 345 ; *McClelland v. Louisville, &c. R. Co.*, 94 Ind. 276 ; 18 Am. & Eng. R. Cas. 260 ; *Peavey v. Georgia, &c. R. Co.*, 81 Ga. 485 ; *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.), 304 ; *Murphy v. Union R. Co.*, 118 Mass. 228 ; *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. S.) 321 (may refuse to carry gambler) ; *ante*, § 297. The company has a right to remove any person

wrongfully on the train, and in such cases no liability attaches unless the right is exercised in an unreasonable or unlawful manner. *Lake Shore, &c. R. Co. v. Pierce*, 47 Mich. 277 ; *Shelton v. Lake Shore, &c. R. Co.*, 29 Ohio St. 214 ; *post*, § 364. In *Lemont v. Washington, &c. R. Co.*, 1 Mackay (D. C.), 180, 46 Am. Rep. 238, it was held that a person who is unable to sit up, and is sick to vomiting in a horse-car, may lawfully be expelled from the car. But the court admitted that this rule would not be applicable on a steam-railway.

⁵ *Pittsburgh, &c. R. Co. v. Vandyne*, 57 Ind. 576 ; *ante*, § 297. An intoxicated passenger who advises other passengers not to pay their fare is guilty of disorderly conduct, and the conductor of the train may, after tendering him such "proportion of the fare he has paid as the distance he then is from the place to which he has paid his fare bears to the whole distance for which he has paid his fare," remove him from the train, and, unless unnecessary force is used, the company incurs no liability on account of such removal. *Baltimore, &c. R. Co. v. McDonald*, 68 Ind. 316.

with due regard to the safety of the person expelled ; where sick or intoxicated passengers are expelled it must be at such a time and place, and under such conditions, as not to endanger their health or safety.¹

A passenger who is guilty of gross misconduct, either by insulting or assaulting other passengers or the conductor, or who uses vile or profane language in the car, or who threatens to assault other passengers or the conductor, may lawfully be expelled from the train.² So also a passenger may be expelled who refuses to comply with the reasonable regulations of the company.³ But a railway train is legally open to passengers of all grades and classes who deport themselves properly, and comply with the reasonable regulations of the company ; and no one has a right to expect or require that all persons who are carried therein shall be above reproach in a moral or social sense, or that their attire or personal appearance shall be such as is adapted to drawing-room use, but only that their conduct, attire, and appearance shall be decent, and not such as to disgust the eyes of persons of ordinary sensibilities, or the moral sensibilities of persons whose sensibilities in that respect are of an ordinary class. The reputation of a passenger, however bad, so long as he conducts himself properly, affords no ground for expelling him from the train. The spirit of our institutions and form of government does not uphold the exercise of such unwarrantable powers, or permit them to be conferred upon irresponsible persons, to act at their own pleasure and determine arbitrarily whether a person is or is not a

¹ *Atchison, &c. R. Co. v. Weber*, 33 Kan. 543 ; 52 Am. Rep. 543 ; 21 Am. & Eng. R. Cas. 418. As to the company's duty to sick or intoxicated passengers, see *post*, § 362. See also *ante*, § 318 *a*.

² *Pittsburgh, &c. R. Co. v. Van Houten*, 48 Ind. 90. Thus, where a passenger on a street-car, without reasonable provocation, angrily calls the conductor a liar, in the presence and hearing of the other passengers, he is guilty of disorderly conduct which will warrant his expulsion. *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536. So, where he refuses, in profane and vulgar language, to pay proper fares. *Louisville, &c. R. Co. v. Johnson*, 92 Ala. 204 ; 9 So. Rep. 269. Or, where he uses profane language, whether addressed to the conductor or not. *Chicago, &c. R. Co. v. Griffin*, 68 Ill. 499. But the use of

vulgar and indecent language will not justify expulsion, unless it is in a tone so loud as to be heard by other passengers. *Chicago City R. Co. v. Pelletier*, 134 Ill. 120.

³ In an action for an unlawful expulsion, the defence was that plaintiff refused to pay the additional fare required of passengers who had with them packages too large to be carried on the lap without incommoding others. *Held*, that it was for the jury to determine whether two parcels 20 by 24 inches in size were within the purview of the regulation requiring the extra fares. Evidence as to the number of passengers in the car at the time is admissible as showing whether or not other passengers were incommoded. *Morris v. Atlantic Ave. R. Co.*, 116 N. Y. 552 ; 22 N. E. Rep. 1097.

proper person to be conveyed in a public vehicle. Reputation and character are of too much value to be sacrificed or injured by any such summary proceeding, and the wisdom of the decision last referred to cannot be successfully questioned.

A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from hotels, theatres, and other public places cannot be imported into the law of common carriers, nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women.¹ Therefore where a woman was excluded from the "ladies' car" because she was of notoriously bad character, and the defendant carrier pleaded a reasonable regulation authorizing the exclusion, and that the plaintiff came within it, the court held that it was a mixed question of law and fact as to whether the regulation was reasonable or not, to be submitted to the jury, on proper instructions by the court, and that it would not be determined on demurrer.² The motion for new trial was overruled, and a verdict of \$3,000 for the expulsion of the plaintiff sustained.³ It would be ill-advised and extraordinary to confer upon railway conductors the power to determine whether or not a female passenger was a chaste or unchaste person, or whether or not a reputation which attached to her in that respect was so notorious as to justify her expulsion or exclusion from railway trains merely on account of such reputation; and it is to be hoped that such extraordinary legislation will not find general favor in the States of this country. The power of removal from the trains for extreme misconduct, etc., upon the trains, seems to be quite sufficient for all humane or practical purposes, without establishing a tribunal of "*one*" to act both as judge and jury, to determine arbitrarily and without responsibility whether or not a person's reputation in certain respects is such as to deprive him of the right to travel in public vehicles, — and thus to ostracise, if not virtually to outlaw him.

A person who refuses to pay his fare or to show his ticket when

¹ *Brown v. Memphis, &c. R. Co.*, 5 Fed. Rep. 499; 1 Am. & Eng. R. Cas. 247.

² *Brown v. Memphis, &c. R. Co.*, 4 Fed. Rep. 37.

³ *Brown v. Memphis, &c. R. Co.*, 7 Fed. Rep. 51.

demand by the conductor, from that time becomes a trespasser, and may be removed from the train ;¹ and the same is also true where the rules of the company require all passengers to purchase a ticket before entering the cars, and forbid the conductors from taking money for fares ; a passenger who neglects to supply himself with a ticket may be removed from the car although he tenders his fare in money.² So where a person is wrongfully in possession of his ticket, although ignorant of that fact, as where he innocently purchased it with counterfeit money, he may be ejected from the train unless he rectifies the wrong upon demand.³ The same rule prevails where in paying his fare to the conductor, the latter through mistake gives the passenger back too much change ; unless he rectifies the mistake when called upon to do so, he may be expelled.⁴

¹ *Pittsburgh, &c. R. Co. v. Van Houten*, 48 Ind. 90; *Stone v. Chicago, &c. R. Co.*, 47 Iowa, 82; 29 Am. Rep. 458; *Hibbard v. N. Y. Cent. R. Co.*, 15 N. Y. 455; *Bennett v. New York Cent. R. Co.*, 5 Hun (N. Y.), 589; *affirmed*, 69 N. Y. 594; 35 Am. Rep. 250; *Swan v. Manchester, &c. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432. But in such cases the passenger must always be allowed a reasonable time in which to produce his ticket or to pay the fare. *Louisville, &c. R. Co. v. Fleming*, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 347; *ante*, § 350. A person has no right to a passage upon a ticket which has been punched so as to indicate that it has once been used, nor where it has been so mutilated as to render it impossible to determine whether it has been used or not. Thus, where a passenger attempted to travel upon a train, offering a ticket that was void by reason of having a hole punched in it, and was ejected from the cars three or four miles from a station, it was held that while the passenger might have been ejected at a regular station, the company had no right to eject him at any other point, and having done so, were liable, but that \$1,000 damages were excessive ; and a verdict for that amount was set aside. *Terre Haute, &c. R. Co. v. Vanatta*, 21 Ill. 188; 74 Am. Dec. 96; *Chicago, &c. R. Co. v. Peacock*, 43 Ill. 253. A railway company owned and operated two tracks from S. to R., one of which was longer than the other, and the fare upon the

longer route was forty-five cents more than upon the other. A passenger, having purchased a ticket for the short route, insisted upon riding upon the long route without paying the extra fare ; the conductor punched his ticket, but put him off at the next station. " It was held that the ticket was not destroyed by being punched, and that the conductor had a right to expel the passenger upon his refusal to pay the fare. *Adwin v. N. Y. Central R. Co.*, 60 Barb. (N. Y.) 590. Where a passenger offered a worthless piece of paper, claiming to be a pass, and refused to pay fare or leave the train, the servants of the company had a right to remove him from the train at a regular station, and to use the necessary force for the purpose. *Chicago, &c. R. Co. v. Herring*, 57 Ill. 59.

² *McCarthy v. Dublin, &c. Ry. Co.*, 5 Ir. Rep. C. L. 244; *Lane v. East Tenn. R. Co.*, 5 Lea (Tenn.), 124.

³ *Memphis, &c. R. Co. v. Chastine*, 54 Miss. 503. See also *Bishop on Contracts*, § 692.

⁴ Thus, a passenger who had not procured a ticket previously to entering the train, handed the conductor a \$10 bill to pay his fare of \$6.20 ; in making the change the conductor handed him \$5 too much. Upon the demand of the conductor that the mistake be corrected, M. refused, and declined to examine his change to ascertain if the conductor's claim of mistake was correct. When he had ridden as far as the payment made entitled him

A passenger cannot excuse himself from paying his fare, when demanded, by the circumstance that he had not then decided how far he would go or at what station he would stop. Thus, the plaintiff got upon the train without a ticket, and when his fare was demanded, declined to pay at the time, on the ground that he had not yet made up his mind how far he would go. The conductor demanded of him that he should pay to some place on the line. On his refusal, the train was stopped, and as he was being put off, he tendered a twenty-dollar gold-piece and offered to have two dollars out of it, that being the fare to C. The conductor, however, insisted on expelling him from the train. It was held that the action of the conductor was justifiable.¹

Where a passenger has purchased a ticket and applies for passage, the employes of a railway company have no discretion, but are bound to carry him according to the terms of the ticket. If the holder of the ticket deports himself properly, the company has no right to refuse the ticket, or, so long as he deports himself properly, to eject him from the train before reaching the station named in the ticket.² And it is the duty of the agents to ascertain whether a passenger has purchased a ticket, before ejecting him from the cars; and their negligence in this respect cannot be pleaded or urged as a defence, nor considered in mitigation of damages. If it afterwards turns out that the passenger had a ticket, then no matter how much the agent was mistaken, nor how honestly he may have believed that the passenger had not paid for his ticket, or how little force was used in ejecting the passenger, the act was nevertheless unlawful and wrong; and for any injury which the passenger received on account of such expulsion he is entitled to full compensation in damages.³

In an action for damages against a railroad company for ejecting

to ride he was directed to leave the train, and did so. It was held that, having the means at hand to determine whether or not the mistake had been made, and failing to use them, he was not entitled to damages for expulsion from the train. *McCarthy v. Chicago, &c. R. Co.*, 41 Iowa, 432. Where the conductor collects too little fare from a passenger who has had an opportunity to get a ticket but failed to do so, and afterwards discovers his mistake, he may, within a reasonable time, require passenger to pay the difference, and on his failure to do so may expel him. Conduc-

tor's failure to demand the difference until a station has been passed does not constitute a waiver, even if he had authority to make such a waiver. *Wardwell v. Chicago, &c. R. Co.*, 46 Minn. 514; 49 N. W. Rep. 206, *qualifying* *Du Laurants v. St. Paul, &c. R. Co.*, 15 Minn. 49; 2 Am. Rep. 202.

¹ *Fulton v. Grand Trunk Ry. Co.*, 17 U. C. Q. B. 428.

² *Churchill v. Chicago, &c. R. Co.*, 67 Ill. 390.

³ *Quigley v. Central Pacific R. Co.*, 11 Nev. 350.

the plaintiff from the defendant's cars, evidence that a friend of the plaintiff offered to pay the amount claimed by the conductor, while the latter was attempting to put the plaintiff off the train for refusal to pay his fare, was held not to be proper evidence to show that the plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance. But evidence that the plaintiff had made an ineffectual attempt to procure a ticket before entering the train, although incompetent to show his right to remain on the cars without payment of fare, would be proper, in order to show his good faith in getting aboard without his ticket, and as a part of the *res gestæ*.¹ In a Texas case, a passenger purchased a ticket from one not the agent of the road, which was issued by one who was the general ticket-agent of another railway company. The agent issuing the ticket was authorized, by custom among railroads, only to issue tickets of a certain prescribed form. The ticket purchased was not of the prescribed form, and on being presented was not accepted by the conductor, who ejected the passenger from the car after the train had proceeded a few miles from the station, on his refusing to pay his fare as a passenger. On appeal by the railway company from a judgment for \$750 damages against it, it was held that, the ticket having been issued by one who at most occupied to the defendant company the relation of special agent, the passenger purchased the ticket at his own peril. The ticket when presented being detached from the stub, and having printed on it the words "not good if detached," the conductor acted properly in rejecting it.²

A passenger who presents to the conductor a "stock pass" from the railroad company, which entitles him to return on its road without payment of fare, can recover damages sustained by him when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, — although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes; and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return.³ In a New York case, the

¹ Perkins v. Missouri, &c. R. Co., 55 Mo. 201. See Louisville, &c. R. Co. v. Fleming, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 347; *post*, p. 1679.

² Houston, &c. R. Co. v. Ford, 53 Tex. 364.

³ Graham v. Pacific R. Co., 66 Mo. 536. Where the plaintiff purchased an excursion-ticket with the printed condition, "Good this day only on all trains, except the Boston express trains," and was expelled from the Boston express train for

plaintiff purchased from defendant at Patchogue an excursion-ticket to Brooklyn which read, "Good until three days after date. Excursion-ticket," and on the same rode to Brooklyn. On the following day he took a train from Brooklyn, which arrived at Babylon late at night, and did not connect with any train for Patchogue. He drove to the next station east, remained there over night, and in the morning took a train for Patchogue, from which he was without violence ejected by the conductor, in compliance with a regulation of the company providing that stop-over checks should not be given on excursion-tickets. It was held that the company was authorized to remove him, and that he was not entitled to recover; that the plaintiff, under his contract with the company, could only demand a continuous passage.¹

A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train-fare of persons without tickets, although he may have an understanding or contract with the station-agent of whom the ticket was purchased, that it would be received after the time limited on the face of it; and on the refusal to pay the fare, ejection from the train was not wrongful. And the measure of damages, in a suit for a breach of the alleged contract, is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination.²

non-payment of fare, it was held that he had no cause of action. *Nolan v. New York, &c. R. Co.*, 41 N. Y. Super. Ct. 541.

¹ *Terry v. Flushing, &c. R. Co.*, 13 Hun (N.Y.), 359. In the case of *Gregory v. Burlington, &c. R. Co.*, 10 Neb. 250, G. a resident of Lincoln, Nebraska, purchased in Chicago a land-exploring ticket, with coupons attached, to Lincoln and return, of an agent of the B. & M. R. Co. in Nebraska, for \$23.75, the regular fare to Lincoln being \$18.75. The ticket contained provisions that it was to be used only by the purchaser, who was to sign his name to the same whenever requested to do so by the conductors of the train. It was held that a resident of the State, if he made no misrepresentations in purchasing the same, could purchase and use such a ticket, but no one but the purchaser could use it, and that possession of the ticket

was *prima facie* evidence of ownership; and that the failure of the plaintiff to sign his name to the contract on the ticket, there being no evidence that he had been requested to do so, did not invalidate it, as the signature was merely a mode of identifying the purchaser; and that the rules and regulations of the company could not be pleaded as an excuse for not performing an express contract; that, even if the ticket was obtained by false representations, the contract was voidable, not void, and the company could not retain the excess over regular fare, and refuse to perform the contract; nor would the failure of the agent to require the purchaser to sign the contract invalidate the ticket, notwithstanding these rules, if the company retained the consideration. *Gregory v. Burlington, &c. R. Co.*, 10 Neb. 250.

² *Hall v. Memphis, &c. R. Co.*, 15 Fed. Rep. 57.

A person on a train refusing to produce a ticket or pay his fare, subsequently changing his mind, and tendering full fare, would be entitled to continue his journey on the train. But if the refusal be accompanied by improper conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right; and the conductor, using proper discretion, may remove him notwithstanding a tender of full fare is then made.¹ But this rule is subject to the exception that if the circumstances of the refusal of the passenger to pay are not such as make him strictly a trespasser, — that is, where the refusal to comply with the conductor's demands is made through an honest misunderstanding as to his rights, and is not captious nor accompanied with abusive or insolent language or action, — a tender of the fare at any time before an actual eviction from the train reinstates him as a passenger, and he cannot be lawfully expelled.² Thus, a passenger who gets upon

¹ *Gould v. Chicago, &c. R. Co.*, 18 Fed. Rep. 155; *Hoffbauer v. Delhi, &c. R. Co.*, 52 Iowa, 342; 35 Am. Rep. 278; *Louisville, &c. R. Co. v. Harris*, 9 Lea (Tenn.), 180; 16 Am. & Eng. Rep. Cas. 374; *Thomas v. Geldart*, 4 P. & B. (N. B.) 95; *O'Brien v. New York Central R. Co.*, 80 N. Y. 236; *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.), 140; *Farwell v. Grand Trunk R. Co.*, 15 U. C. C. P. 427; *Shedd v. Troy, &c. R. Co.*, 40 Vt. 88; *Wentz v. Erie R. Co.*, 3 Hun (N. Y.), 241; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 570; *Boston, &c. R. Co. v. Proctor*, 1 Allen (Mass.), 267; 79 Am. Dec. 729; *Lillis v. St. Louis, &c. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255; *Sherman v. Chicago, &c. R. Co.*, 40 Iowa, 45; *Powell v. Pittsburgh, &c. R. Co.*, 25 Ohio St. 70; *Railroad Co. v. Skillman*, 39 Ohio St. 444; 13 Am. & Eng. R. Cas. 31; *People v. Jillson*, 3 Park. Cr. Rep. (N. Y.) 234; *Pease v. Delaware, &c. R. Co.*, 101 N. Y. 367; 54 Am. Rep. 609; 26 Am. & Eng. R. Cas. 185; *Hibbard v. New York, &c. R. Co.*, 15 N. Y. 455; *Atchison, &c. R. Co. v. Dwelle*, 44 Kan. 394; 44 Am. & Eng. R. Cas. 402; *Pickens v. Richmond, &c. R. Co.*, 104 N. C. 312; 10 S. E. Rep. 556. "The right to refuse to transport the plaintiff further and eject him from the train would be an idle and useless exercise of legal authority if the party, who had hitherto refused to perform the

contract by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfilment of the original contract by the defendant." *GRAY, J.*, in *O'Brien v. Boston, &c. R. Co.*, 15 Gray (Mass.), 23; 77 Am. Dec. 347.

² *Louisville, &c. R. Co. v. Harris*, 9 Lea (Tenn.), 180; 16 Am. & Eng. R. Cas. 374; *O'Brien v. N. Y. Cent. R. Co.*, 80 N. Y. 236; 1 Am. & Eng. R. Cas. 259; *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.), 140. In such cases the conductor should not insist on an immediate expulsion, but should allow the passenger a reasonable time in which to obtain the fare from his friends on the train or to make some such arrangement. *Clarke v. Wilmington, &c. R. Co.*, 91 N. C. 506; 18 Am. & Eng. R. Cas. 366. The passenger's refusal must not be too long persisted in by him, and he must show clearly his honest intent; there is strong authority for the view that the passenger's motive or intent is immaterial in such cases, and that after the train has been stopped, or nearly so, it is too late to tender compliance with the conductor's demands no matter how honestly the passenger had acted in refusing. *Atchison, &c. R. Co. v. Dwelle*, 44 Kan. 394; 44 Am. & Eng. R. Cas. 402; *Stone v. Chicago, &c. R. Co.*, 47 Iowa, 82; 29 Am. Rep. 458; *Marshall v. Boston, &c. R. Co.*, 145 Mass. 164; 31 Am. & Eng. R. Cas. 18.

the cars of a railroad company in good faith, in ignorance of the fact that a tax-certificate would not pay his fare, having no intention to impose upon the carrier, cannot be treated as a mere trespasser; but on failure or refusal to pay his fare, after request and after reasonable opportunity allowed to comply, he may be ejected or put off the cars by the conductor; but if before eviction another person offers to pay the fare, the carrier is bound to receive it and convey the passenger.¹ But where the refusal to pay is such that the passenger becomes a trespasser, he cannot, after the bell is rung to stop the train, reinstate himself as a passenger by an offer to pay his fare.² So when a passenger has been ejected from the train, and

¹ *Louisville, &c. R. Co. v. Garrett*, 8 Lea (Tenn.), 438; 41 Am. Rep. 640; 3 Am. & Eng. R. Cas. 316; *South Carolina R. Co. v. Nix*, 68 Ga. 572. A railway company as a carrier is entitled to receive its fare as a condition precedent to carrying passengers; but when this is paid or offered to be paid, the duty is imperative on the carrier, where no legal objection to the passenger exists. An offer to pay the fare of a passenger by a third party while the conductor is on his way out with the passenger, and before actual ejection, must be accepted by the conductor, and ejection after such offer is unlawful where there is no captious or fractious or vexatious refusal to pay, but only an inability growing out of a mistake. *Garrett v. Louisville, &c. R. Co.*, 8 Lea (Tenn.), 438; 41 Am. Rep. 640; *O'Brien v. New York Cent. R. Co.*, 80 N. Y. 236. An actual tender of the fare demanded, made before the train is stopped, cannot be rightfully refused by the conductor no matter who makes it. *Ham v. Delaware, &c. Canal Co.*, 142 Penn. St. 617; 21 Atl. Rep. 1012. Where a passenger tenders a railway conductor a certain amount of fare to be carried to a certain station, which is less than the rate fixed by the company, saying he will pay no more, and the conductor retains enough to take the passenger to an intermediate station and returns the balance, the passenger will have the right, on reaching such intermediate station, to pay the fare demanded from that point to the place of his destination, and upon his offering to pay the same he cannot rightfully be put off the train. *Chicago, &c. R. Co. v. Bryan*,

90 Ill. 126. If a passenger is ejected from a train for failure to pay his fare, and after the train is in motion he tenders it, the conductor is not bound to stop the train to receive his fare and take him on board; but if the tender were made while the train was standing still, the conductor was bound to receive the fare and admit the passenger. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

² *Hoffbauer v. Delhi, &c. R. Co.*, 52 Iowa, 342; 35 Am. Rep. 278; *Harrison v. Fink*, 42 Fed. Rep. 787; *supra*, n. 1, p. 1678. But where the train is stopped at a regular station, at which it would have stopped any way, if the passenger before he is ejected offers to pay the fare, it should be accepted. The contrary rule applies only where the train is stopped expressly to put him off. *Toledo, &c. R. Co. v. Wright*, 68 Ind. 586; 34 Am. Rep. 277. In *O'Brien v. New York Central R. Co.*, 80 N. Y. 233, 1 Am. & Eng. R. Cas. 259, an action by a passenger for his wrongful ejection from one of defendant's trains, for refusal to pay as much fare as was demanded by the conductor, it appeared that the train had stopped at a regular station, and not for the sole purpose of putting plaintiff off. Before he was ejected, the plaintiff and other persons in his behalf, after the train was stopped, offered to pay the full amount of fare demanded. It was held that evidence of this fact was admissible on behalf of the plaintiff. If the stoppage had been made for the sole purpose of putting the plaintiff off, and he had rendered it necessary by a fractious refusal to pay the extra fare, he

purchases a ticket from the point at which he has been ejected, and attempts to re-enter the train, he must pay fare from the point at which he first entered the train, before he can insist on being carried forward on the same train.¹

But in all cases where a passenger is expelled for not having a ticket, it must appear that he had reasonable opportunity to secure one,² and if he has not had such opportunity he cannot be expelled, nor can he be compelled to pay the extra fare usually demanded of passengers who pay on the train.³ If he is on the train without a ticket however, he cannot insist on the train's being stopped long enough at a station for him to secure one.⁴

would not have been entitled to insist on continuing his trip after having occasioned such an interruption. But the station being a regular stopping-place of the train, if, before being ejected, he or others in his behalf offered to pay the full fare, the conductor should have accepted it. The hypothetical case put *obiter* by the court arose and was decided in *Hoffbauer v. Delhi, &c. R. Co.*, 52 Iowa, 342; 35 Am. Rep. 278. The cars were stopped to eject the passenger, when he tendered the proper fare, but it was refused, and he was put off. This was sustained. The court said: "The rule that a passenger may test the regulations of the company and the firmness of the conductor by refusing to pay full fare, and still save himself from expulsion by tendering full fare after expulsion had commenced, is not only uncalled for for the just protection of the recusant passenger, but would tend to encourage a practice which, if indulged in, would interfere with the convenience of the company, and the despatch and quiet to which other passengers are entitled. In *Stone v. Chicago, &c. R. Co.*, 47 Iowa, 82, 29 Am. Rep. 458, where the passenger was ejected at a regular station for non-payment of fare, and then purchased a ticket to the desired point, he could not demand re-admission to the same train without paying the disputed fare for the unpaid distance. In *Georgia, &c. R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. Rep. 13, the rule is said to be that if the passenger had a right to refuse conductor's demand he is entitled, on offering compliance, to be carried although the train may have

been stopped in order to expel him. But if his refusal was wrongful he is not entitled to continue his journey on that train upon tendering the amount conductor had demanded. The case of *South Carolina R. Co. v. Nix*, 68 Ga. 572, was reviewed and limited. This rule is applied in *Ward v. N. Y. Cent. R. Co.*, 56 Hun (N. Y.), 268.

¹ *Stone v. Chicago, &c. R. Co.*, 47 Iowa, 82; 29 Am. Rep. 458; *State v. Campbell*, 33 N. J. L. 309; *Swan v. Manchester, &c. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; *O'Brien v. Boston, &c. R. Co.*, 15 Gray (Mass.), 20; 77 Am. Dec. 347; *O'Brien v. N. Y. Central R. Co.*, 80 N. Y. 236; *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.), 140.

² See *supra*, § 360, where this subject is examined.

³ *Hall v. So. Carolina R. Co.*, 25 S. C. 564. And if the company fails to comply with the statute requiring the office to be kept open for a specified time before trains, the passenger need not show that he applied for a ticket during that time. *Missouri Pac. R. Co. v. McClannahan*, 66 Tex. 530; 1 S.W. Rep. 576. Passenger boarded the train at a flag-station and paid conductor fare to the next regular station, the conductor assuring him that he could get a ticket there. When he arrived there the ticket-office was closed and he was not able to get a ticket. *Held*, that he could not be compelled to pay more than the regular ticket-rates from there on to his destination. *Georgia R., &c. Co. v. Murden*, 86 Ga. 434; 12 S. E. Rep. 630.

⁴ *Easton v. Waters (Tex. App.)*, 16 S. W. Rep. 540.

A conductor upon the defendant's train removed therefrom the plaintiff's intestate, who had failed to produce a ticket when required, and who had no money to pay his fare. There was evidence tending to show that the intestate had bought and lost his ticket, and before he was expelled, one of his companions tendered the fare to the conductor, who refused to receive it, demanding a ticket. The intestate, who was very much intoxicated, was put off the train in a cut about twenty feet deep. He proceeded in the direction of his home for a quarter of a mile or more, when he lay or fell down and was run over and killed, about fifteen minutes later, by the train of another company which had the right to run its cars over the defendant's road. It was held that, as the intestate was wrongfully removed from the train, the question as to whether his death was or was not directly traceable to such removal should have been left to the jury, and that the court erred in non-suiting the plaintiff.¹

SEC. 362. Place of Removal. — Except in cases where the statute provides that a passenger shall only be expelled at a regular station, or near a dwelling-house, the question as to whether he was properly expelled at any point is one of fact, to be determined by the circumstances. "The passenger who refuses to pay fare is from that moment an intruder and wrongfully on the train. He has no lawful right to be carried to the next station."² But in the case of a

¹ *Guy v. New York, &c. R. Co.*, 30 Hun (N. Y.), 399.

² *Jeffersonville, &c. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; s. c. 36 Ind. 116; 10 Am. Rep. 103; *Toledo, &c. R. Co. v. Wright*, 68 Ind. 586; 34 Am. Rep. 277; *Brown v. Chicago, &c. R. Co.*, 51 Iowa, 235; *Haley v. Chicago, &c. R. Co.*, 21 Iowa, 15; *Chicago, &c. R. Co. v. Boyer*, 1 Brad. (Ill.) 472. *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Magee v. Oregon, &c. R. Co.*, 46 Fed. Rep. 734 (expulsion from a boat); *Hall v. Memphis, &c. R. Co.*, 15 Fed. Rep. 57; 9 Am. & Eng. R. Cas. 348; *Rudy v. Rio Grande, &c. R. Co.* (Utah, 1892), 30 Pac. Rep. 366. "The mere fact of remoteness from the station is not material. In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised, all the circumstances should be considered: as the physical condition of the person ejected; the time, whether in daylight or

late at night; the condition of the country, whether thickly or sparsely settled; the character of the weather, whether pleasant or inclement, etc. etc. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place and be conducted in such manner as not unreasonably to expose the party to danger. But as a rule of law we do not think a railroad company can be held liable simply for ejecting a recalcitrant passenger at a point remote from a station if in other respects he is not subjected to an unreasonable danger." *Brown v. Chicago, &c. R. Co.*, 51 Iowa, 238. "In the case of a trespasser on the train, — that is, a person wrongfully upon it, as where he enters it intending not to pay the fare when properly demanded, — the conductor is not required to put him off at one place rather than another, provided he do not wantonly expose him to peril of serious personal injury. With that qualification, he may put him off at a place other than a station, and is

person who is by reason of any infirmity unable to travel, or find his way from the point where he is put off to a dwelling-house or town; or if a person is put off the train at a point remote from habitations at a time when the weather is so inclement as to render it unsafe or inhuman to do so, — the company would be liable therefor. Thus, in a recent case in Kentucky,¹ the plaintiff while intoxicated got on the defendant's railway train, and refusing or failing to pay his fare, was put off by the conductor in the snow, and by exposure to the cold was severely frozen and lost several of his toes and fingers. A recovery was maintained.² In most of the States the statute makes provision that the removal shall be made at a regular station, or near a dwelling, etc.; and in such case, the statute must be complied with or the removal will be unlawful.³ In Indiana, where the statute provides that a person refusing to pay his fare, the conductor, etc., "may put him out of the cars at any usual stopping-place," it is held that this is merely a permissive and not a peremptory statute, and that, as the right to expel exists independently of the statute, it does not prevent the company from putting out the passenger at any other point.⁴ But in Texas, under a similar statute, it was held that

not required to consider his mere convenience. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210." *Hardenburgh v. St. Paul, &c. R. Co.*, 39 Minn. 4. But one is not a trespasser when he has a ticket but refuses to surrender it until the conductor furnishes him a seat. *Hardenburgh v. Northern Pac. R. Co.*, 39 Minn. 4.

¹ *Louisville, &c. R. Co. v. Sullivan*, 81 Ky. 624; 16 Am. & Eng. R. Cas. 390.

² See also as upholding the same views, *Atchison, &c. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543; 21 Am. & Eng. R. Cas. 418; *Connolly v. Crescent City R. Co.*, 41 La. An. 57; 37 Am. & Eng. R. Cas. 117 (street-car conductor mistaking epilepsy for drunkenness); *Paddock v. Atchison, &c. R. Co.*, 37 Fed. Rep. 841 (passenger suffering from infectious disease); *Hall v. So. Car. R. Co.*, 28 S. C. 261; 34 Am. & Eng. R. Cas. 311. But the company is not liable for the death of an expelled passenger caused by his being run over by another train after his expulsion, where his intoxication was not sufficient to destroy consciousness, and the place where he was put off was familiar to him and not dangerous except to persons

unnecessarily going on the track. *Louisville, &c. R. Co. v. Johnson*, 92 Ala. 304; 9 So. Rep. 269. Compare *Atchison, &c. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543. See also *ante*, § 318 a; *Vankirk v. Penn. R. Co.*, 76 Penn. St. 66; 18 Am. Rep. 404; *Galena v. Hot Springs R. Co.*, 13 Fed. Rep. 116.

³ *Texas, &c. R. Co. v. Casey*, 52 Tex. 112; *Hobbs v. Texas, &c. R. Co.*, 49 Ark. 357; 34 Am. & Eng. R. Cas. 268; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420; *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596; 37 Am. & Eng. R. Cas. 126; *Stephen v. Smith*, 29 Vt. 160; *Nichols v. Union Pac. R. Co. (Utah)*, 27 Pac. Rep. 693. The California Civil Code (§ 487) provides that the expulsion shall be "at a usual stopping-place or near a dwelling-house." See *Wright v. California Cent. R. Co.*, 78 Cal. 360.

⁴ *Toledo, &c. R. Co. v. Wright*, 68 Ind. 586; 34 Am. Rep. 277. The conductor is not obliged to expel the passenger at the first station reached after the right to expel has been acquired. He may allow passenger to travel on to any station not beyond

a person could only be ejected at a place where passengers are received; that a place at which trains sometimes stopped for wood and water was not a proper place for expulsion, and that a person expelled at such a place might recover damages therefor.¹

SEC. 363. Manner of Removal. — The conductor and servants of a railway company have a right to use all the force necessary to remove a passenger from the train who has forfeited his right to remain there, *and no more*. The same rule prevails in this respect as exists relative to the removal of persons from one's dwelling, and if the force used is excessive, or brutal, or if there is any unnecessary rudeness, the company is responsible therefor.² To every person on the train, whether he is lawfully there or a mere trespasser, the company owes a measure of duty and is bound to refrain from inflicting upon him a wilful injury, and it must answer in damages for any excessive or unnecessary exercise of its right to eject, or for its exercise in an unlawful manner.³ In a Wisconsin case,⁴ the company had set apart a car for the exclusive use of ladies unattended by gentlemen, and the plaintiff being unable to find a seat elsewhere on the train, except in the smoking-car, went into the ladies' car, without objection from any one, in which there were many vacant seats, and when about to occupy one of these, without having been first requested to leave the car, was rudely and violently seized by the defendant's brakeman, and forcibly thrust from the car to the platform; the train was then crossing a river, though, from the construction of the platform, the peril to the plaintiff from that circumstance was slight; the assault was committed in the presence of a number of ladies and gentlemen; the plaintiff's cane and a ring on one of his fingers were broken, and the broken ring cut the finger to the bone, making a ragged wound; the back of one of his hands was

his destination and expel him at any one of them he chooses; such conduct does not amount to a waiver of the right to expel. *Lake Erie, &c. R. Co. v. Mayo* (Ind. App.), 30 N. E. Rep. 1106. And the company is never bound to consult the convenience of the party whom it has a right to eject. *Atchison, &c. R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290.

¹ *Texas, &c. R. Co. v. Casey*, 52 Tex. 112. In Illinois, it is held that a "regular station," as used in the statute, means a place where passenger trains usually stop for the purpose of receiving or discharging passengers, and not merely a town or vil-

lage in which a depot is located. *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

² *Galena v. Hot Springs R. Co.*, 13 Fed. Rep. 116; *State v. Ross*, 26 N. J. L. 224; *Coleman v. New York, &c. R. Co.*, 106 Mass. 160; *Gt. Western R. Co. v. Miller*, 19 Mich. 305.

³ *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536; *Columbus, &c. R. Co. v. Powell*, 40 Ind. 37; *Pennsylvania R. Co. v. Toomey*, 91 Penn. St. 256; 1 Am. & Eng. R. Cas. 61; *ante*, § 298.

⁴ *Bass v. Chicago, &c. R. Co.*, 39 Wis. 636; 36 id. 450; 17 Am. Rep. 495.

lacerated or bruised so that blood flowed from the wound; and one arm was somewhat bruised, and showed extravasation for three weeks thereafter. Under instructions which did not allow exemplary damages, the plaintiff had a verdict and judgment for \$4,500, which was held excessive. But upon a new trial it was held that as the injury was one which, in an action against the brakeman, would sustain a verdict for exemplary damages, if the company ratified his act it was likewise liable for such damages.¹ In a New York case, a brakeman was stationed by the defendant at the entrance to one of its passenger-cars, with orders to notify gentlemen not in charge of ladies that such car was reserved for ladies, and direct them to cars forward. The plaintiff entered the car after receiving such notice, and was ejected therefrom with undue force, and was seriously and permanently injured. It was held that, although the brakeman, in removing the plaintiff, exceeded the orders given him by using undue force, yet the presumption was that, in doing it, he was acting within the scope of his authority, and a refusal to non-suit the plaintiff on the ground that he was not, was proper.²

The rule seems now to be that *a public carrier of passengers is responsible for all injuries to its passengers resulting from the acts of its*

¹ Bass v. Chicago, &c. R. Co., 42 Wis. 654; 17 Am. Rep. 495.

² New York Central R. Co. v. Peek, 70 N. Y. 587. If a conductor approaches a passenger with a drawn revolver and commands him to leave the train, he is guilty of a gross outrage, especially when the passenger has shown no such resistance as to justify such a course. Indeed, it may be said that, with or without a deadly weapon, a conductor has no right to compel a passenger to leave the train by threats of bodily harm, especially when it is in motion. Galena v. Hot Springs R. Co., 13 Fed. Rep. 116. But where a servant does draw a deadly weapon upon a passenger it is competent for the company to show that the train has been boarded in that locality on previous occasions by roughs and confidence men, who had attacked the servant, for the purpose of explaining why he was armed, especially where exemplary damages are claimed on account of the use of such weapon. Chicago, &c. R. Co. v. Boger, 1 Brad. (Ill.) 472. While a passenger may be expelled for non-payment of fare, etc., yet

it must be done in a decent manner, and with discretion. If the expulsion is made with undue force, or under circumstances which show brutality, it cannot be justified. Thus, a female passenger purchased a ticket for a passage from Kansas City to Utica. She exhibited her ticket to the baggage-master, who checked her baggage to that point, and was assisted to board the train by the company's servant, and was not informed by any of them that the train did not stop at that station. Upon the arrival of the train at a station some miles from Utica, she was told by the conductor to get off, and upon her refusal to do so, he used profane and threatening language to her, and the brakeman, sent by him, took her little girl, thereby compelling her to follow with her baby, and leave the train at nine o'clock at night, where she was compelled to remain in the dark and cold for half an hour until the freight train came along. She was made sick by the exposure. The court held that she was entitled to recover exemplary damages. Hicks v. Hannibal, &c. R. Co., 68 Mo. 329.

*servants malicious or otherwise, and though committed outside the scope of their employment.*¹ Therefore, the conductor being the executive agent of the company, and invested with authority to expel passengers, it follows that the company is liable for all his wrongful acts committed against the passenger in expelling him,² and this even though he may act in excess of or directly contrary to his orders.³ Passengers cannot be subjected to insult and injury, and the company be allowed to escape on the ground that its agent acted beyond his authority. Such a doctrine would prevent recovery for any wrongful expulsion.

In every case the train must be at a full stop when the expulsion is made;⁴ an action may be sustained against the company for for-

¹ *Cracker v. Chicago, &c. R. Co.*, 36 Wis. 657; *Winnegar v. Central Pass. R. Co.*, 15 Ky. 547; 34 Am. & Eng. R. Cas. 462 (assault on passenger by street-car driver); *Stewart v. Brooklyn, &c. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185; 12 Am. & Eng. R. Cas. 127; *Wabash, &c. R. Co. v. Rector*, 104 Ill. 296; 9 Am. & Eng. R. Cas. 264; *Chicago, &c. R. Co. v. Flexman*, 103 Ill. 546; 42 Am. Rep. 33; 8 Am. & Eng. Cas. 354; *ante*, § 315.

² *Hoffman v. New York, &c. R. Co.*, 87 N. Y. 25; 41 Am. Rep. 37; 4 Am. & Eng. R. Cas. 537; *Kline v. Central Pac. R. Co.*, 37 Cal. 400; *Terre Haute, &c. R. Co. v. Fitzgerald*, 47 Ind. 79; *Columbus, &c. R. Co. v. Powell*, 40 Ind. 37; *Ramsden v. Boston, &c. R. Co.*, 104 Mass. 117; *Holmes v. Wakefield*, 12 Allen (Mass.), 580; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; 80 Am. Dec. 282; *Higgins v. Watervliet, &c. Co.*, 46 N. Y. 23; 7 Am. Rep. 293; *Rounds v. Delaware, &c. R. Co.*, 64 N. Y. 129; *affirming* 3 Hun, 329; *Hamilton v. Third Ave. R. Co.*, 13 Abb. Pr. N. S. (N. Y.) 318; 44 How. Pr. (N. Y.) 294; *Healey v. City Pass. R. Co.*, 28 Ohio St. 23; *Pennsylvania R. Co. v. Vandiver*, 42 Penn. St. 365. "There is no authority which would exempt the company from some amount of responsibility for any wrongful expulsion of a passenger by a conductor. He represents them [the company] in the whole management of his train, and the power to do any serious mischief is chiefly derived from their vesting him with the control of this large agency. He occupies the same position as the mas-

ter of a ship and his . . . action must be regarded as done in the line of his employment." CAMPBELL, J., speaking for the court in *Great Western R. Co. v. Miller*, 19 Mich. 305. See also *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; 34 Am. & Eng. R. Cas. 316; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421 (judicial notice taken of conductor's employment and its scope).

³ *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536; *Moore v. Fitchburg, &c. R. Co.*, 4 Gray (Mass.), 465; *Chicago, &c. R. Co. v. Bryan*, 90 Ill. 126; *Chicago City R. Co. v. Pelletier*, 134 Ill. 120; *Philadelphia, &c. R. Co. v. Derby*, 14 How. (U. S.) 468; *Heening v. Pullman Palace Car Co.*, 20 Fed. Rep. 100; 18 Am. & Eng. R. Cas. 379; *Bayley v. Manchester, &c. R. Co.*, L. R. 7 C. P. 415; 3 Moak's Rep. 148; 4 id. 384. See, however, *Pennsylvania Co. v. Toomey*, 91 Penn. St. 256; 1 Am. & Eng. R. Cas. 461. And without regard to the original liability of the company it certainly becomes responsible for such acts of its servants as it expressly or impliedly ratifies or sanctions. And the retention of the wrong-doer, or his promotion, with knowledge of his previous conduct, is strong evidence of such ratification. *Perkins v. Missouri, &c. R. Co.*, 55 Mo. 201; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39. *Contra*, as to presumption created by retention. *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 504; *Williams v. Pullman Car Co.*, 40 La. An. 87; 33 Am. & Eng. R. Cas. 407.

⁴ *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248; *Kansas City R. Co. v. Kelly*,

cibly expelling even a disorderly passenger from a train in motion, though no special injury was occasioned thereby.¹

SEC. 364. **Damages for Wrongful Expulsion.**—The cases arising in this connection are of two classes: those in which the company had no right to expel, and those in which the right existed but was exercised in a wrongful manner. A third class may exist in which the expulsion was both wrongful in itself and wrongfully carried out. In the first class of cases the expelled passenger is entitled to recover all the damages sustained in consequence of the expulsion,² and this includes compensation for the insult and humiliation necessarily occasioned him in being compelled to leave the car in the presence of his fellow-passengers,³ as well as the pecuniary loss⁴ and

36 Kan. 655; 34 Am. & Eng. R. Cas. 281; Holmes v. Wakefield, 12 Allen (Mass.), 580; State v. Kinney, 34 Minn. 311; Isaac v. Third Ave. R. Co., 47 N. Y. 142; 7 Am. Rep. 418. Compare Southern Kansas R. Co. v. Sanford, 45 Kan. 372; 25 Pac. Rep. 891 (not negligence *per se* where train was moving very slowly).

¹ Oppenheimer v. Manhattan R. Co., 63 Hun (N. Y.), 633. But it is held in Kansas that it is a prejudicial error to give a charge from which the jury might infer that it was negligence *per se* to expel the passenger while the train was in motion. Southern Kan. R. Co. v. Sanford, 45 Kan. 372; 25 Pac. Rep. 891.

² Pittsburgh, &c. R. Co. v. Slusser, 19 Ohio St. 157; Hicks v. Hannibal, &c. R. Co., 68 Mo. 329; Louisville, &c. R. Co. v. Conrad, 4 Ind. App. 83; 30 N. E. Rep. 406; Indianapolis, &c. R. Co. v. Hower-ton, 127 Ind. 236. Extra fare paid, the humiliation of being expelled in the presence of other passengers, the inconvenience of reaching destination by walking are proper elements of damage to be considered by the jury. Little Rock, &c. R. Co. v. Dean, 43 Ark. 529; 21 Am. & Eng. R. Cas. 279. See Parker v. Long Island R. Co., 13 Hun (N. Y.), 319. He is entitled to more than nominal damages in such a case even though he sustains no pecuniary loss nor actual injury to his person. Chicago, &c. R. Co. v. Chisholm, 79 Ill. 584.

³ Georgia R. Co. v. Homer, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186; Chicago, &c.

R. Co. v. Chisholm, 79 Ill. 584; Lake Erie, &c. R. Co. v. Fixe, 88 Ind. 381; 11 Am. & Eng. R. Cas. 109; Chicago, &c. R. Co. v. Holdridge, 118 Ind. 281; Wilsey v. Louisville, &c. R. Co., 83 Ky. 511; 39 Am. & Eng. R. Cas. 513; Quigley v. Central Pac. R. Co., 5 Sawy. (U. S.) 107; Carsten v. Northern Pac. R. Co., 44 Minn. 454; 44 Am. & Eng. R. Cas. 392; Serwe v. Northern Pac. R. Co., 48 Minn. 78; 50 N. W. Rep. 1021; Murphy v. Western, &c. R. Co., 23 Fed. Rep. 637; 21 Am. & Eng. R. Cas. 258 (colored passenger expelled from coach set apart for whites). The measure of passenger's damages cannot be confined to compensation for loss of time, expenses incurred, and cost of ticket. The jury are to award fair compensation, and their award is conclusive in the absence of evidence that it was affected with prejudice. Pennsylvania R. Co. v. Spicker, 105 Penn. St. 142; 23 Am. & Eng. R. Cas. 672. In Chicago, &c. R. Co. v. Williams, 55 Ill. 185; 8 Am. Rep. 642, a colored woman was, on account of her color, expelled from a car set apart for ladies and their escorts; she offered to pay the extra fare, and there was no regulation of the company requiring the separation of passengers according to color. It was held that a verdict of \$200 was not excessive, in view of the humiliation occasioned to her, though she suffered no other personal injury or pecuniary loss.

⁴ Atchison, &c. R. Co. v. Gants, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; Quigley v. Central Pac. R. Co., 5 Sawy. (U. S.) 107; Southern Kan. R. Co. v.

inconvenience and bodily harm he may suffer.¹ The expulsion without cause is not merely a breach of the contract of carriage, but is a violation of the carrier's public duty and constitutes a tort; as a consequence the passenger is entitled to recover damages for all injuries which result as a natural and proximate consequence of the wrongful expulsion; he is not confined to such damages as were in contemplation of the parties at the time the contract of carriage was made.² Thus, where a party is forcibly and unlawfully ejected from

Rice, 38 Kan. 398; 34 Am. & Eng. R. Cas. 316.

¹ *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248; *Brown v. Hannibal, &c. R. Co.*, 66 Mo. 588; *Serwe v. Northern Pac. R. Co.* (Minn.), 50 N. W. Rep. 1021 (injury to plaintiff's health). But a passenger wrongfully expelled cannot recover for injury to his health caused by his walking to his destination when he had money and an opportunity to ride. *Georgia R., &c. Co. v. Eskew*, 86 Ga. 641; 12 S. E. Rep. 1061.

² *Roster v. Chesapeake, &c. R. Co.* (W. Va.), 15 S. E. Rep. 158; *Louisville, &c. R. Co. v. Fleming*, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 347.

In *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454; 44 Am. & Eng. R. Cas. 392, plaintiff was put off at a station some distance from his destination, where he was delayed several days on account of lack of funds with which to buy a new ticket. In consequence of the delay he lost a valuable job. It was held that such a loss was too remote to constitute an element of damage. But ordinarily it seems that if in consequence of delay caused solely by a wrongful expulsion, the passenger loses a valuable contract he should recover damages for the loss. Such damages are always recoverable in cases where similar loss is occasioned by a telegraph company's failure to send a message promptly and correctly, although in such cases the right of action is contractual merely. And in actions for similar damages resulting from delays caused by wrongful expulsion the ground of recovery is *ex delicto*, thus involving a more comprehensive measure of damages. It seems therefore, from reason and analogy, to be a correct proposition that the expelled passenger may recover

for the loss of valuable contract occasioned by the delay resulting from the wrongful expulsion, particularly so where the company is informed of the consequences which will attend a delay. See Am. & Eng. Ency. Law, article on "*Telegraphs*," where all the cases are reviewed; *Thompson on Electricity*, §§ 325 *et seq.*; *W. U. Tel. Co. v. Longwill* (N. Mex.), 21 Pac. Rep. 339; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *W. U. Tel. Co. v. McKibben*, 114 Ind. 511; 14 N. E. Rep. 894; 21 Am. & Eng. Corp. Cas. 133; *Parks v. Alta, &c. Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; *Kemp v. W. U. Tel. Co.*, 28 Neb. 661; 44 N. W. Rep. 1064; 30 Am. & Eng. Corps. Cas. 607; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.), 575; 5 Am. & Eng. Ency. Law, p. 13. Compare *Merrill v. Western Un. Tel. Co.*, 78 Me. 97. The cases denying the right in these cases to recover damages against telegraph companies did so on the ground that such damages were remote in that they were not in contemplation of the parties at the time of making the contract. But in actions *ex delicto* the damages are not restricted to so narrow a limit; they extend to all the natural and proximate consequences of the wrongful act without regard to whether they were contemplated by the parties or not. See 16 Am. & Eng. Ency. Law, 476. These views receive support in the case of *Hardy v. N. Y. Cent. R. Co.*, 58 Hun (N. Y.), 607, where it was held that it was proper to admit evidence that the ejected passenger had with him tools needed for the prosecution of a certain work in progress at his destination, and that damages could be recovered for loss sustained by reason of the delay. Where a passenger is ejected wrongfully from a train, and, while leaving the car, slipped and was injured,

a car, in the presence of other passengers, and the conductor publicly announces that the passenger has refused to pay his fare, a jury may properly find from such facts that the party thus ejected suffered feelings of shame and humiliation, without any other proof on that subject.¹ And in estimating the damages the jury may take into consideration the plaintiff's condition in life, his reputation in the community, and any circumstances attending the act complained of; but they cannot consider the wealth of the defendant or the poverty of the plaintiff.² If the agent uses more force than is necessary to eject a passenger, or uses vile epithets towards him, such conduct should always be considered by the jury in aggravation of damages.³

It should always be recognized that the contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. Therefore where there is a dispute arising on the train about the ticket, it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And there is good authority for the view that if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare, or quietly left the train and sued for a breach of the contract.⁴

the injury resulting from the slipping is too remote for recovery. *Williamson v. Grand Trunk R. Co.*, 17 U. C. C. P. 615.

¹ *Chicago, &c. R. Co. v. Chisholm*, 79 Ill. 584; *Chicago, &c. R. Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641.

² *Hays v. Houston, &c. R. Co.*, 46 Tex. 272; *Chicago, &c. R. Co. v. Bryan*, 90 Ill. 126; *Georgia R. Co. v. Homer*, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186; *Higgins v. Cherokee R. Co.*, 73 Ga. 149; 27 Am. & Eng. R. Cas. 218; *W. U. Tel. Co. v. Henderson*, 89 Ala. 510; *Hunn v. Mich. Cent. R. Co. (Mich.)*, 44 N. W. Rep. 502.

³ *Quigley v. Central Pacific R. Co.*, 11 Nev. 350. But see *Hicks v. Hannibal, &c. R. Co.*, 68 Mo. 829.

⁴ *Hall v. Memphis, &c. R. Co.*, 15 Fed. Rep. 57; 9 Fed. Rep. 585; 9 Am. & Eng.

R. Cas. 348; *Chicago, &c. R. Co. v. Griffin*, 68 Ill. 499 (reasons for this view well stated); *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Georgia R. Co. v. Homer*, 73 Ga. 251 (exemplary damages allowed in such a case under Ga. statute); *Atchison &c. R. Co. v. Gants*, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; *Peabody v. Oregon, &c. R. Co.*, 21 Oreg. 121; 26 Pac. Rep. 1053; *Pennsylvania Co. v. Bray*, 125 Ind. 279. But a passenger has a right to resist an unlawful expulsion, and if he is injured in consequence of the extra force required for his expulsion, the rule seems to be that he may recover for such injury; and whether the expulsion is authorized or not he has a right to resist being expelled in a dangerous place or manner. *Louisville, &c. R.*

In the second class of cases, — that is, where the right to expel exists, — there can be no recovery of damages unless the expulsion was attended with undue force or violence, or was carried out in an otherwise improper manner.¹ But for every improper exercise of this right the company is liable to the passenger for such damages as he may sustain in consequence of such improper exercise. Thus, in a Louisiana case,² a passenger on a street-car was seized with an apoplectic fit so that his presence on the car was an annoyance to other passengers, and the conductor, mistaking the attack for intoxication, stopped the car, and removed the sick passenger from it, leaving him lying on the street exposed to the snow and hail which was falling. The passenger being utterly helpless lay there for some time, and soon died from the exposure. In an action by his administrator, the court recognized that the right to expel existed in such a case, but held that it had been exercised in an improper manner; the company was therefore held liable for damages for the death of the passenger. So in a somewhat similar case in Kansas, where the company expelled an intoxicated passenger at a point remote from a station, and he, being unable to take care of himself, was run over by a subsequent train, the court held the company liable for his death, though it conceded the right of the company to expel such a passenger at a proper time and place.³

Co. v. Wolfe, 128 Ind. 347; 27 N. E. Rep. 606; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; 80 Am. Dec. 286; *English v. Delaware, &c. Co.*, 66 N. Y. 454; 23 Am. Rep. 69. But if the expulsion is justifiable, extra force made necessary by his resistance is no ground for an action. *Chicago, &c. R. Co. v. Brisbane*, 24 Ill. App. 463.

¹ *Lake Shore, &c. R. Co. v. Pierce*, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340; *Rose v. Wilmington, &c. R. Co.*, 106 N. C. 168; 11 S. E. Rep. 526; *Eddy v. Elliot* (Tex. 1891), 15 S. W. Rep. 41; *New York, &c. R. Co. v. Bennett*, 50 Fed. Rep. 496; 1 C. C. A. 544 (imperative and positive language of the conductor no ground for action).

Therefore, where the right to expel exists, but undue force is used, the damages cannot include compensation to the passenger for the inconvenience in having to walk to the station, though at night. *Texas, &c. R. Co. v. James*, 82 Tex. 306; 18 S. W. Rep. 589.

² *Conolly v. Crescent City R. Co.*, 41 La. An. 57; 37 Am. & Eng. R. Cas. 117.

³ *Atchison, &c. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543; 21 Am. & Eng. R. Cas. 418; *Louisville, &c. R. Co. v. Sullivan*, 81 Ky. 624; 16 Am. & Eng. R. Cas. 390; *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 397 (expulsion of sick passenger).

In the case of *International, &c. R. Co. v. Smith* (Tex. 1886), 1 S. W. Rep. 565; 27 Am. & Eng. R. Cas. 148, a lady passenger was on the wrong train through a mistake of the company's agent, and on her refusing to pay fare for being carried further, after the mistake was discovered, she, with her two infant children, was expelled. The place at which she was expelled was a lonely one, remote from a station, the time was in the night, and she had to walk back several miles through swamps and over a high railroad bridge, attended by a negro guide who repeatedly insulted her. The court held that while

Where the expulsion is an act of malice on the part of the company or its servants, or the manner of expulsion wilfully or maliciously rough and unnecessarily violent, the passenger may recover exemplary damages in addition to compensation for the injury suffered.¹ But in such cases there must be clear proof of malice or wilful wrong, and the mere fact that the expulsion is not justifiable is no ground for the award of such damages.²

As to excessive damages the rule is well recognized that if the

the company might have properly refused to carry her indefinitely, yet it had no right to expel her in any such manner; and that a verdict for \$8000 in her favor would not be disturbed. See also *International, &c. R. Co. v. Wilkes*, 68 Tex. 617; 34 Am. & Eng. R. Cas. 331; *Missouri Pac. R. Co. v. Kaiser*, 82 Tex. 144; 18 S. W. Rep. 305 (expulsion of young girl at strange place); *International, &c. R. Co. v. Gilbert*, 64 Tex. 536; 22 Am. & Eng. R. Cas. 205.

If the conductor ejects a passenger so that he is run over and disabled by the train, and another train of the same line passing shortly afterwards extinguishes what life is left, a right of action arises, whether the actual death was caused by the first or second train. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

¹ *Lake Shore, &c. R. Co. v. Rosenzweig*, 118 Penn. St. 519; 26 Am. & Eng. R. Cas. 489; *Hall v. South Carolina R. Co.*, 28 S. C. 261; 34 Am. & Eng. R. Cas. 311; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; 34 Am. & Eng. R. Cas. 316; *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248 (passenger ejected from moving train at midnight); *Louisville, &c. R. Co. v. Wolfe*, 128 Ind. 347; 27 N. E. Rep. 606.

Under the peculiar statute law of Georgia in regard to exemplary damages the decisions appear somewhat at variance with the text; but the variance is only so far as made necessary by the statute. *City, &c. R. Co. v. Brauss*, 70 Ga. 368; 18 Am. & Eng. R. Cas. 324; *Georgia R. Co. v. Homer*, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186; *Western, &c. R. Co. v. Turner*, 72 Ga. 292; 28 Am. & Eng. R. Cas. 455; *Georgia R., &c. Co. v. Eskew*, 86 Ga. 641; 12 S. E. Rep. 1061. Where

a passenger is wrongfully put off a train at a flag-station at midnight in a wintry storm, a great distance from his starting point and destination, and in attempting to walk to the next station falls through a cattle-guard and is injured, it is proper to submit to the jury the question as to whether the conduct of the conductor in putting him off was wanton, reckless, and oppressive, and therefore the proper subject of exemplary damages. *Evans v. St. Louis, &c. R. Co.*, 11 Mo. App. 463; *Kansas Pacific R. Co. v. Kessler*, 18 Kan. 523.

² *Philadelphia, &c. R. Co. v. Rice*, 64 Md. 63; 26 Am. & Eng. R. Cas. 264; *Pine v. St. Paul City R. Co.* (Minn. 1892), 52 N. W. Rep. 392; *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318; 26 Am. & Eng. R. Cas. 190; *Tomlinson v. Wilmington, &c. R. Co.*, 107 N. C. 327; *Philadelphia Traction Co. v. Orbaun*, 119 Penn. St. 37; 34 Am. & Eng. R. Cas. 432; *Louisville, &c. R. Co. v. Guinan*, 11 Lea (Tenn.), 98; 13 Am. & Eng. R. Cas. 37.

It is error to instruct the jury that if they find that the conductor refused to allow plaintiff to ride on his ticket when no good excuse existed therefor, they might presume that he acted malevolently, and award exemplary damages. In this case the conductor had ejected plaintiff under an honest conviction that his ticket was not good. *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; 47 N. W. Rep. 312. In *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298, it is said that if the street-car company has exercised due care in the selection of its servants it will not be liable for more than compensatory damages for a wrongful expulsion by one of its conductors unless it ratifies the wrongful act.

plaintiff has a right to recover any damages at all, and only proper elements of damage are considered, the verdict of the jury assessing the amount of damages will not be disturbed unless it is so grossly disproportionate to the injury as to indicate clearly that it was the result of passion or prejudice.¹ Where the plaintiff was ejected,

¹ See the rule of the text applied to various states of fact, and the award held not excessive, in *International, &c. R. Co. v. Smith* (Tex. 1886), 1 S. W. Rep. 565; 27 Am. & Eng. R. Cas. 148 (\$8000 not excessive); *International, &c. R. Co. v. Wilkes*, 68 Tex. 617; 34 Am. & Eng. R. Cas. 331 (\$500 not excessive — passenger compelled to walk a long distance at night, from which he became ill); *Lake Erie, &c. R. Co. v. Christison*, 39 Ill. App. 495 (\$75 not excessive — passenger expelled one third of a mile from starting point at daylight in the rain); *Boster v. Chesapeake, &c. R. Co.*, 36 W. Va. 318; 15 S. E. Rep. 158 (\$500 dollars not excessive — passenger compelled to walk nine miles to station and sustaining injury to his health); *Missouri Pac. R. Co. v. Martino* (Tex.), 18 S. W. Rep. 1066 (\$2020 not excessive where passenger, a woman, was treated with great rudeness and struck on the head); *Indianapolis, &c. R. Co. v. Howerton*, 127 Ind. 236; 26 N. E. Rep. 792; *East Tenn. &c. R. Co. v. King*, 88 Ga. 443; 14 S. E. Rep. 708 (\$500 not excessive — passenger required to pay extra fare by second conductor).

The damages were held to be excessive in the cases following: *McLean v. Chicago, &c. R. Co.* (Minn.), 52 N. W. Rep. 966 (\$250 — no special inconvenience or particular loss shown); *Doran v. Brooklyn, &c. Ferry Co.*, 19 N. Y. Supp. 172 (\$1500 — no malice being shown, merely a slight rough treatment); *Cunningham v. Seattle, &c. R. Co.*, 3 Wash. St. 471; 28 Pac. Rep. 745 (of \$1500 verdict, \$1000 was required to be remitted, passenger having only been expelled from street-car at ten o'clock in the morning, and no malice or rough treatment being proven); *Finch v. Northern Pac. R. Co.*, 47 Minn. 36; 49 N. W. Rep. 329 (\$500 — no actual force used, nor any improper language employed). Where, owing to a misunderstanding, a lady was not per-

mitted to travel upon a return excursion-ticket, and she left the train and took the next one, upon which her ticket was recognized, it was held that a verdict of \$1,000 damages was excessive. *Goins v. Western R. Co.*, 59 Ga. 426. In a suit against a railway company for expelling the plaintiff from its car, where there is nothing to authorize the recovery of vindictive damages, and no actual damage is shown, a judgment for \$750 will not be sustained. *Pittsburgh, &c. R. Co. v. Dewin*, 86 Ill. 296. So where the plaintiff purchased a ticket at Elko for San Francisco, and was ejected from the cars within half a mile from Elko, *without sustaining any bodily injuries, the conductor using no more force than was necessary to eject him*, was delayed one day and had to buy another ticket at an expense of \$40.50, it was held that a verdict of \$5,000 was so excessive as to indicate passion and prejudice upon the part of the jury. *Quigley v. Central Pacific R. Co.*, 11 Nev. 350. So where a passenger is wrongfully expelled from the cars, and it appears that while there was a sharp scuffle, some blows given, and some blood drawn, there were no broken limbs or bones, no permanent injury or disfiguration, no long confinement, no protracted pain and suffering, no heavy expenses for medicine, nursing, or physician, little loss of time, not to exceed a day's delay, and no circumstances of outrage and insult independent of the actual expulsion, — it was held that a verdict awarding \$5,000 was excessive. *Missouri, &c. R. Co. v. Weaver*, 16 Kan. 456. So where a passenger was wrongfully removed from a parlor-car for a refusal to pay his fare, by one of the defendant's conductors, who was acting in good faith, and the only unnecessary violence consisted in seizing him, while standing upon the ground, and pulling him from the car while he was holding on the rail by one hand, thereby wrenching him and injuring

without violence, by the conductor, under the mistaken impression that he had not paid his fare, and the inconvenience was but trifling, and the jury awarded £50 damages, a new trial was awarded on the ground of excessive damages.¹ In an Indiana case, the conductor took up the ticket of a passenger, which entitled him to ride to a certain place, and, having given him no check, afterwards, when within a few miles of the passenger's destination, accused him of attempting to ride beyond the distance for which he had paid, charging him with falsehood, and treating him insolently in the presence of the other passengers, and with the help of a brakeman, seized and put him off the train in a rude and angry manner, at a place where there was no station or house, it being cold and dark, and being about nine o'clock at night, and the passenger had to walk to his destination. In an action by the passenger against the company for damages for such treatment, there was a verdict for the plaintiff for \$700; and it was held that the damages were not excessive.² So where a passenger was expelled from the train in a rough manner, accompanied with profane and unbecoming language, the court would not disturb, as excessive, a verdict for damages in the sum of \$562.50.³ So an award of \$2,500 for compensatory damages was held, especially in view of the former verdicts in the case, not to be so disproportioned to the injury sustained as to bear marks of passion, prejudice, partiality, or corruption in the jury, and therefore not to be excessive.⁴

In a suit by a passenger for being wrongfully ejected from the

his finger, so that subsequently a felon appeared, from which he suffered two weeks, and the judge charged that compensatory damages only could be allowed, — it was held that a verdict for \$3,000 was excessive, and should be set aside. *Cox v. New York Central R. Co.*, 11 Hun (N. Y.), 621. So where a verdict is given on conflicting evidence contrary to a strong intimation from the court, and assessing against a corporation damages at \$350 for injuries to the plaintiff's feelings and a *slight pinching of his hands* in ejecting him from a car for alleged non-payment of fare, — it was held not sufficient to show that the jury was actuated by passion and prejudice. *Hamilton v. Third Ave. R. Co.*, 40 N. Y. Superior Ct. 376.

¹ *Huntsman v. Great Western Ry. Co.*,

20 U. C. Q. B. 24; *Davis v. Gt. Western Ry. Co.*, 20 U. C. Q. B. 27. In an action for a wrongful expulsion it is competent for a witness who was present to state what he heard said on the occasion of such expulsion, leaving it to others to identify the persons who made the statements. *Indianapolis, &c. R. Co. v. Anthony*, 43 Ind. 183.

² *Indianapolis, &c. R. Co. v. Milligan*, 50 Ind. 392. See *Lake Erie, &c. R. Co. v. Fixe*, 88 Ind. 381; 11 Am. & Eng. R. Cas. 309 (similar case — \$600 not excessive).

³ *St. Louis, &c. R. Co. v. Myrtle*, 51 Ind. 566.

⁴ *Bass v. Chicago, &c. R. Co.*, 42 Wis. 654; 24 Am. Rep. 437.

cars, it appeared that the rates of fare fixed by the company, and which, by its established rules, it was made the duty of the conductor to demand, were higher than were lawful. The plaintiff tendered the legal rates, and upon refusal to pay more, was ejected from the cars, but without any rudeness or unnecessary violence. It also appeared that the plaintiff, at the time he took passage, knew the established rates, and expected to be expelled from the cars, intending to bring an action therefor, in order to test the right of the company to charge the established rates. It was held that the plaintiff was only entitled to compensatory damages, and that it was competent for the company, for the purpose of mitigating damages, or preventing the recovery of exemplary damages, to give in evidence subsequent declarations of the plaintiff, tending to prove that his object was to make money by bringing suits against the company for demanding illegal fares.¹

SEC. 365. **Free Passes or Tickets.**² — A pass given to a person by a railway company entitles the person holding it to ride upon the road according to its terms, unless it is revoked by the company, as it may be even during the passage, unless given upon some consideration. Being given, gratuitously it follows, according to some authorities, that the company may impose any reasonable condition upon its use, except that it cannot by any condition absolve itself from liability for gross negligence.³ And such conditions enure to

¹ Cincinnati, &c. R. Co. v. Cole, 29 Ohio St. 126; St. Louis, &c. R. Co. v. Trimble, 54 Ark. 354; 15 S. W. Rep. 899.

² See also *ante*, § 186, as to grants of free passes.

³ "It cannot be disputed that an individual transported over the route of a carrier of passengers may debar himself, by a contract founded upon a sufficient consideration, from any claim to damages for injuries to his person or property occasioned by the negligence of such corporation during the course of transportation." New York, &c. R. Co. v. Seybolt, 95 N. Y. 562; 18 Am. & Eng. R. Cas. 168; Poucher v. New York Cent. R. Co., 49 N. Y. 263; 10 Am. Rep. 364; Annas v. Milwaukee, &c. R. Co., 67 Wis. 46; 27 Am. & Eng. R. Cas. 102; Kinney v. Central R. Co., 34 N. J. L. 513; Quimby v. Boston, &c. R. Co., 150 Mass. 365; 40 Am. & Eng. R. Cas. 693 (passenger bound

though he did not sign pass); Hosmer v. Old Colony R. Co. (Mass. 1892), 31 N. E. Rep. 652; Gallin v. London, &c. R. Co. L. R. 10 Q. B. 212; McCauley v. Furness R. Co., L. R. 8 Q. B. 57. See the subject examined in 30 Cent. L. Jour. 397; 29 Am. Law Reg. 391; *infra*, § 367. See also Boswell v. Hudson River R. Co., 5 Bosw. (N. Y.) 699; Elliott v. Western R. Co., 58 Ga. 457. A stipulation in a free pass that passenger will not claim damages for injuries whether received through the company's negligence or otherwise is not against public policy and will be binding on passenger's personal representatives. Griswold v. New York, &c. R. Co., 53 Conn. 371; 26 Am. & Eng. R. Cas. 280.

Conflict of Laws. — The validity and effect of stipulations in the contract of carriage will be determined by the law of the place where it was made. Therefore a passenger suing in Ohio for an injury

the benefit of connecting carriers unless it is otherwise expressly stipulated.¹ It has also been held that, inasmuch as the passage is gratuitous, the person accepts it subject to all its conditions, and therefore that the company may absolve itself from *all* liability to the holder for gross negligence.²

But, having regard to the uniform and long continued policy of the law towards companies engaged in the discharge of public duties, allowed unusual privileges, and intrusted with grave responsibilities, the better doctrine in point of principle appears to us to be that *such stipulations in free passes, in so far as they seek to relieve the railroad company from liability from the consequences of its negligence are utterly void.* And this view has the strong support of high authority.³ "The weight of American authority," says the Iowa court, "is that a common carrier of passengers cannot, by notice or special contract, limit or avoid its common-law liability for negligence."⁴ In a

received in that State, while travelling on a free pass issued in New York, will be bound by the terms of the contract on the pass, though such a contract if made in Ohio would not have been upheld. *Knowlton v. Erie R. Co.*, 19 Ohio St. 260.

¹ *Hall v. Northeastern Ry. Co.*, L. R. 10 Q. B. 437; *Wells v. N. Y. Central R. Co.*, 26 Barb. (N. Y.) 641; *affirmed*, 24 N. Y. 181; *Perkins v. N. Y. Central R. Co.*, 24 N. Y. 208; 82 Am. Dec. 281; *Western R. Co. v. Harwell*, 91 Ala. 340; *Kinney v. Central R. Co.*, 32 N. J. L. 407; 90 Am. Dec. 675; 34 N. J. L. 513.

² *Kinney v. Cent. R. Co.*, 32 N. J. L. 407; 90 Am. Dec. 675. The New York courts treat this matter of "gross negligence," so called, very properly. They hold that the stipulation may exempt the company from liability for any negligence of whatever degree, and discard the supposed distinction between the different degrees of negligence as "unnecessary and impracticable." They go on to hold that the cases which say that the company cannot stipulate for exemption from liability for "gross negligence" employ this term to indicate wilful misconduct or a recklessness indicative of an entire disregard of their public duties to passengers. *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 281; *Wells v. New York Cent. R. Co.* 24 N. Y. 181. The courts

are unanimous in holding that against liability for the consequences of such wilful conduct the railway cannot secure any exemption. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Arnold v. Illinois Cent. R. Co.*, 85 Ill. 80.

³ *Gulf, &c. R. Co. v. McGowan*, 65 Tex. 640; 26 Am. & Eng. R. Cas. 278; *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409; 37 Am. & Eng. R. Cas. 46; *Buffalo, &c. R. Co. v. O'Hara* (Penn. 1882), 9 Am. & Eng. R. Cas. 317 (and one riding on free pass in violation of constitution is not a trespasser), *Camden, &c. R. Co. v. Bausch* (Penn. 1886), 7 Atl. Rep. 731; 28 Am. & Eng. R. Cas. 144; *Dawson v. Chicago, &c. R. Co.*, 79 Mo. 296; *Harvey v. Terre Haute, &c. R. Co.*, 74 Mo. 541; *Grand Trunk Ry. Co. v. Vogel*, 11 Sup. Ct. Can. 12; 27 Am. & Eng. R. Cas. 18; *Jacobus v. St. Paul, &c. R. Co.*, 20 Minn. 125; *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48; *Sager v. Portsmouth, &c. R. Co.*, 31 Me. 228; *Mobile, &c. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Cleveland, &c. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Flinn v. Wilmington, &c. R. Co.*, 1 Houst. (Del.) 469; *Cooley on Torts*, 685; *Whart. on Neg.*, §§ 641, 589. See also *Penn. R. Co. v. Henderson*, 51 Penn. St. 315.

⁴ *Rose v. Des Moines, Valley R. Co.*, 39 Iowa, 249.

case in the Federal Supreme Court, it appeared that A., who was the owner of a patented car coupling, for the adoption and use of which by a railroad company he was negotiating, went at the request and expense of the company to a point on its road to see one of its officers in relation to the matter. A free pass was furnished him by the company. During the passage the car in which he was riding was thrown from the track by reason of the defective condition of the rails, and he was injured. The court held: (1) That the pass was given for a consideration, and that he was a passenger for hire; (2) That being such, his acceptance of the pass did not estop him from showing that he was not subject to the terms and conditions printed on the back of the pass exempting the company from liability for any injury he might receive by the negligence of the company or otherwise.¹

The courts, which recognize the validity of the stipulations under consideration by which the company is released from liability for all injury whether the result of its negligence or otherwise, look upon such agreements with much disfavor, and construe them with all strictness possible in favor of the injured passenger. They will not construe the contract as providing for immunity from liability for negligence unless it is expressed in plain and unequivocal terms. Thus, a clause in a contract between an express company and a railroad company that the latter "is hereby released from and guaranteed against any liability for any damage done to the agents of the express company, whether in their employ as messengers or otherwise," is not such an unequivocal exemption as will bar an action for the death of an express messenger, travelling on the faith of the contract, by the negligence of the railroad company.² And it is held in construing the same contract that an express messenger is not chargeable, in the absence of actual notice, with knowledge of the

¹ *Railway Co. v. Stevens*, 95 U. S. 655.

² *Kenney v. New York Cent. R. Co.*, 125 N. Y. 422; 26 N. E. Rep. 626; *affirming* 7 N. Y. Supp. 255. The railroad company contracted with a telegraph company that employes of the latter should be allowed to travel on certain passes which were to contain a stipulation releasing the former from all liability. In an action by one of the employes of the telegraph company it was held that such contract would be no defence; the rail-

road must show the pass in which plaintiff was travelling, and such pass must contain the unequivocal stipulation in order to defeat recovery. *Elliot v. New York Cent. R. Co.*, 11 N. W. Supp. 691. And a pass stipulating that the holder assumes all risks of accidents and damages affords no defence to an action against the company for injuries sustained by the holder caused by the defective condition of the road-bed and track. *Bryan v. Missouri Pacific R. Co.*, 32 Mo. App. 228.

exemption clause, and an action may be maintained by his representative for damages for his death caused by the negligence of the railroad company.¹

Irrespective of special contracts the carrier owes the same duty to passengers travelling free as to those who pay fare.²

In some cases the company has had inserted in the pass a provision by which it is agreed that the holder during the entire passage shall be deemed an employé of the company, and that "the company shall in no case be liable to us for any injury or damage sustained by us during such time for which it would not be liable to its regular employés."³ In considering a case in which an agreement of this kind was involved the Supreme Court of Texas has held that the holder of the pass, having sustained an injury through the negligence of the company, is entitled to recover regardless of the provision. Justice COLLARD, speaking for the Court, reiterated the very just principles which had previously been followed in that State: "We believe it is and ought to be the settled law that a common carrier cannot by contract exempt itself from liability for injuries and damages resulting from its own negligence. The public have an interest in the contract, which a private individual cannot waive. If such liability could be avoided by contract there would be an end to the liability altogether. Our conclusions are that we are to look to the real relations of the carrier and the passenger, regardless of any fiction or pretence of the agreement, and then apply the law; to declare the liabilities arising from the actual relations of the parties as the law and public policy demand."⁵

¹ *Brewer v. New York, &c. R. Co.*, 124 N. Y. 59; 26 N. E. Rep. 324; *affirming* 45 Hun (N. Y.), 595. In a case where the company attempted to set up such an exemption against a mail-agent riding under a contract existing between the company and the government, the court held that even if the mail-agent rode on the pass with full knowledge of its contents, the exemption stipulation in such pass would not bind him since he had no authority to alter or add to the government contract by consenting to the exemption. *New York, &c. R. Co. v. Seybolt*, 95 N. Y. 562; 18 Am. Rep. 162. The carrier owes the same duty to mail

gers. *Id.*; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 N. Y. 313.

² *Abell v. Western Maryland R. Co.*, 63 Mo. 433; 21 Am. & Eng. R. Cas. 507 *Philadelphia, &c. R. Co. v. Derby*, 14 How. (U. S.) 468; *ante*, § 297.

³ See *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409, where such a contract is set out at length.

⁴ *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409; 37 Am. & Eng. R. Cas. 51; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268. See also *Gulf, &c. R. Co. v. McGowan*, 65 Tex. 640; 26 Am. & Eng. R. Cas. 274; 34 id. 210.

CHAPTER XXII.

SLEEPING AND PARLOR CARS.

SEC. 366. Their Status as Carriers.

367. Liability of Railway for Injuries to Passengers in Parlor-Cars.

368. Free Pass, Conditional : Effect of Purchase of Ticket in Parlor-Car upon Conditions in.

SEC. 369. Liability of Parlor-Car Companies for Articles Lost or Stolen.

369 a. Obligation to receive Passengers.

SEC. 366. **Their Status as Carriers.** — The practice of running trains composed of coaches belonging to and controlled by two distinct and separate corporations has become a common matter in this country, and since the parlor and sleeping car coaches and the employes in charge of them are subject both to the orders of the railway company and the company owning the coaches, complicated questions necessarily arise as to the relative liability of the two masters. These parlor and sleeping cars are of comparatively modern origin, and have found a place in the affairs of the travelling public so recently that the law relative to their duties and liabilities can hardly be said to be settled, although there have been a number of cases before the courts involving these questions; and to determine their duties and obligations it is necessary to ascertain the position they hold towards the train, as a part of which they are hauled. It is a matter of common knowledge, that these cars are run by a corporation entirely distinct from the railway corporation over whose roads they run, and therefore they are not open to any passenger upon the train, but only to such as pay the requisite extra compensation therefor and are accepted by such company. These corporations, standing alone, cannot be said to be common carriers in any sense, or subject to the rules applicable to common carriers. They do not "carry" the passengers, or undertake to do so, nor do they become responsible for their safe carriage beyond the implied guaranty that their cars are sound, safe, and roadworthy, which is an implied obligation arising from their contract, which applies to any person or corporation who lets a vehicle for hire. It is held, and

with great propriety, that the liability of the railway company for the safe carriage of a passenger in one of these cars, remains unchanged; that by accepting and adopting these cars as a part of its train, it is responsible for any defects therein, and a passenger who is injured by reason of their defective condition may have his remedy against either or both corporations.¹

The palace-car company merely furnishes the car, and says to the travelling public that upon payment of the sum charged for seats therein, we will furnish you with accommodations which you cannot obtain upon the regular trains, — to wit, roomy and comfortable chairs by day, and a bed at night, with toilet arrangements, etc. It simply contracts to furnish these attractive and additional accommodations during the trip. It does not undertake to carry the passenger, nor does it hold itself out as having any authority or control over the train or its passage over the rails. No one understands, or has any right to understand when he takes passage in one of these cars, that the company owning it becomes obligated to him to take him to his point of destination safely, except in so far as the roadworthiness, etc., of its own cars is concerned, or to land him there upon schedule time. But while strictly they are not common carriers of passengers, yet, owing to their peculiar relation to the public and the railway company, they owe certain duties to the public which they cannot evade or shirk. They invite the public to ride in their cars, and by receiving the extra compensation therefor, they impliedly contract that their cars are safe and roadworthy, and that they will at least exercise ordinary care to protect *both the passenger and his property* which he may have in his custody. And they owe a duty to their passengers, therefore, to protect them from insult or injury by their servants or agents.²

¹ See *Williams v. Pullman Pal. Car Co. and Louisville, &c. R. Co.*, 40 La. An. 417; 33 Am. & Eng. Cas. 414; *post*, § 367. The sleeping-car company owes a duty to its passengers to wake them when requested to do so, in time to be ready to leave the train when their stations are reached. *Pullman Pal. Car Co. v. Smith*, 79 Tex. 468; 23 Am. St. Rep. 356. See also *Pullman Pal. Car Co. v. Bales*, 80 Tex. 211; 47 Am. & Eng. R. Cas. 416.

² This duty was specifically declared in *Pullman Car Co. v. Bales*, 80 Tex. 211; 15 S. W. Rep. 785, though it was enforced

in a peculiar way. The plaintiff had hired two berths in the sleeper, one for his wife and her mother and the other for himself. When plaintiff and his wife had retired together in the former's berth, the conductor and porter came to the berth and with great rudeness exposed plaintiff and his wife to view, and compelled her to leave plaintiff's berth. The court held, however, that there was no breach of the contract and no recovery could be had.

In a case in Mississippi, it appeared that plaintiff, while on a car which was both an eating and a sleeping car, ordered

SEC. 367. Liability of Railway Company for Injuries to Passengers in Parlor-Cars. — The sleeping-cars are a part of the train operated by the railroad company as a carrier of passengers, and a passenger's relations with such company *are not affected in any way* by his securing a passage in that part of the train which is owned by a parlor-car company. It is therefore held in a number of cases,¹ that where a passenger has purchased a ticket of a parlor-car company entitling him to ride in its car, and also a passage-ticket of the railway company, the railway company is to be regarded as liable for the negligence of the palace-car company; and that its servants are to be treated as the servants of the railway company in everything that regards the safety and security of the passenger. Upon grounds of expediency and public policy this doctrine is well founded, and it also finds farther and additional support from the obligation which the company is under to run none but safe cars, and those which are fit and adequate for the business;² and it cannot in this respect substitute the care and diligence of another corporation for its own, nor can it shield itself from liability upon the ground that it had no authority or power to repair these cars or test their suitableness. It is bound to do so, and, inasmuch as it is not bound to haul the cars except by virtue of its contract, if it fail to provide in its contract for such examination and repair of the cars as it is bound to make in

his berth to be made up; the porter replied that it would be done as soon as he had furnished two lunches previously ordered. After an angry dispute, plaintiff went into a forward car and sat up all night, though his berth was made up for him. It was held that the evidence afforded no ground for a verdict against the company. *Pullman Pal. Car Co. v. Ehrman*, 65 Miss. 383; 4 So. Rep. 113.

¹ *Penn. R. Co. v. Roy*, 102 U. S. 451; 1 Am. & Eng. R. Cas. 225; *Columbus, &c. R. Co. v. Walrath*, 38 Ohio St. 461; 8 Am. & Eng. R. Cas. 371.

² *Penn. R. Co. v. Roy*, 102 U. S. 451. It appeared in this case that the defendant purchased at the office of the lessee company, in the city of Chicago, a "first-class railroad ticket" from that city to Philadelphia, over the line of that company, paying therefor the sum of \$14.40. At the same time and place, and of the same person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Com-

pany, for the route between the same cities, and for that ticket he paid the additional sum of \$5. He took the train the same day, going immediately into the section of the sleeping-car corresponding to his ticket. The next morning, at Alliance, Ohio, upon the invitation of a friend travelling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so engaged, the upper berth of the section in which they were sitting fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the plaintiff upon the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment. The court held that the railroad company was liable, and that the fact that the plaintiff was not injured in the car in which his ticket entitled him to ride made no difference.

executing its obligations to its passengers, the fault is its own. In each of the cases cited, the plaintiff, who was passenger upon a parlor-car upon the defendant railway, was injured by the fall of a berth, and in both cases the railway company was held liable for the injury. In both of the cases cited stress was placed upon the circumstance that there was no evidence to show that the plaintiffs knew that the parlor-cars were owned and controlled by a separate corporation, and in the absence of proof of knowledge of that fact by a passenger there is no question that he has a right to presume that the whole train is under the care, control, and management of the railway company.¹ What the effect of notice or actual knowledge of the real condition of things would be is thus left open, especially in the Ohio case; but from the grounds upon which HARLAN, J., placed the liability of the railway company, it is doubtful whether that circumstance would have any influence upon the question of liability. The real ground of liability being the duty which the railway company owes to passengers of running none but sound and sufficient cars, and that by consenting to haul the cars, the passenger has a right to regard it as an assurance by it that the car is safe, it is not believed that notice or knowledge of the real *status* of the two companies would affect the liability of either.²

¹ See also *Kinsley v. Lake Shore, &c.* R. Co., 125 Mass. 54; 28 Am. Rep. 200; *Thorpe v. N. Y. Cent. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325.

² In *Columbus, &c. R. Co. v. Walrath*, 38 Ohio St. 461; 4 Week. Law Bull. 11, it was held that a passenger, by train of a railroad company, travelling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management; and in such case, where he sustains injury by the negligence of one in the employ of the sleeping-car company, he may maintain an action against the railroad company. The court said: "Counsel for plaintiff in error argue in this case that sleeping-cars have become recognized as so far necessary to the comfort and convenience of passengers by railway, that railway companies may be compelled, in like manner, to attach the coaches of sleeping-car companies to their trains, where they have failed to provide their own cars for such purpose, in which case there should be a corresponding modi-

fication of the liability of the railroad company; and that whether the arrangement between the companies be enforced or conventional, the railroad company should not be liable for injury to passengers resulting solely from negligence of the agents of the sleeping-car company. In support of this view, attention is called to the fact that in *Penn. R. Co. v. Roy*, 102 U. S. 451, where the liability of the railroad company for an injury received in a car of the Pullman Palace Car Company, was asserted, HARLAN, J., lays stress on the fact that the railroad company had published and circulated cards, which were in such form as to induce the belief that the sleeping-car was under the management and control of the railway company. But on examination of the whole opinion, we find there was no intention to place the liability on such narrow ground; and we have no hesitancy in saying, that in the absence of notice that the company will not be liable for defective appliances in the sleeping-car or negligence of servants of the sleeping-car company, a passenger may well assume

The servants and employés on the sleeping and parlor cars are the servants of the railway company, and it is responsible for all their acts and defaults committed in the performance of their duties and in the scope of their employment. Indeed, the cases go so far as to hold the railway company liable for every wilful or malicious injury to passengers by such servants. In a recent case in Louisiana,¹ the plaintiff, a passenger on a train, desiring to wash his hands, was directed by an employé of the railroad company to go into the adjoining sleeping-car where he would find facilities for bathing. He was met at the entrance of the sleeper by the porter, who, without any cause except that plaintiff asked permission to wash his hands, and demurred to his demand for pay for the privilege, assaulted him and violently ejected him from the car. It appeared that the porter was a mere menial servant of the sleeping-car company, having no police authority whatever, and no connection with the enforcement of the company's rules except to report violations of them to the conductor, and that he had no authority to use violence towards any person for any purpose. The plaintiff brought his action for damages against the sleeping-car company and against the railroad company. On the first appeal it was held that the porter's wanton assault was entirely foreign to the functions of his employment, that the liability of the sleeping-car company for such an assault was not governed by principles regulating the liability of common carriers to their passengers for similar assaults; that the obligation and liability of the company was independent of any contractual relation (plaintiff not holding a sleeping-car ticket), and was governed by the general principles of the law of master and servant common to all systems of law. A judgment of \$2,500 in plaintiff's favor against the sleeping-car company was therefore set aside.¹ On the second appeal it was held that a judgment of \$1000 against the *railroad company* should be upheld. The porter was the servant of the railroad company, and as the relation of passenger and carrier existed between such company and plaintiff, it must answer for all injury done to plaintiff by its servants or agents whether wilful or not.²

that the whole train is under one general management. *Thorpe v. N. Y. Central R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Kinsley v. Lake Shore, &c. R. Co.*, 125 Mass. 54; 28 Am. Rep. 200. How far a railway company may, by agreement with a sleeping-car company, known to the passenger, exonerate itself for liability

for such injuries, is a question concerning which we express no opinion."

¹ *Williams v. Pullman Car Co.*, 40 La. An. 87; 33 Am. & Eng. R. Cas. 407.

² *Williams v. Pullman Car Co.* and *L. N. O. & T. R. Co.*, 40 La. An. 417; 33 Am. & Eng. R. Cas. 414. The case of *Penn. R. Co. v. Roy* (102 U. S. 451), was

The rule is stated in one case to be that where a passenger is wrongfully expelled from a Pullman car of a train by the officers of the company operating the road, the Pullman company is not liable; but if expelled by the officers of the Pullman company, the railroad is not liable.¹ But as already observed the Pullman servants are also agents of the railroad company, and the latter is liable for their wrongful acts towards its passengers in all cases.

SEC. 368. Free Pass, Conditional : Effect of Purchase of Ticket in Parlor-Car upon Conditions in. — In a somewhat recent case in New York,² a passenger on a regular train between Albany and New York

quoted and approved. In the case of *Dwinelle v. New York Cent. R. Co.*, 120 N. Y. 117; 44 Am. & Eng. R. Cas. 384, it appeared that the passenger having been transferred to a new train before the journey was ended, asked the porter to return to him his sleeping-car ticket, or else inform the conductor of his right to a berth in the sleeper. The porter refused, and an altercation ensued in which porter assaulted the passenger. In an action against the railroad company it was held that it was a question for the jury as to whether the porter, at the time of the assault, was acting in the performance of his duties, and, if so, the company was liable; that a common carrier is liable for the wilful and malicious acts of its servants towards a passenger. So, in the case of *Thorpe v. New York Cent. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325, a passenger on defendant's train, finding no vacant seats in the ordinary coaches, all the seats being filled, proceeded to a drawing-room car, owned by a private individual but forming a part of the train and regularly run with it by contract with the defendant, and took a seat there. When asked for extra fare for the seat he refused, stating that he was ready to go into the other cars if a seat was provided for him there. The porter thereupon attempted to eject him. It was held that the defendant railway company was liable for the assault. See also *Heinrich v. Pullman Car Co.*, 20 Fed. Rep. 100; 18 Am. & Eng. R. Cas. 379 (passenger injured by discharge of pistol accidentally discharged by porter).

¹ *Paddock v. Atchison, & C. R. Co.*, 37 Fed. Rep. 841 (small-pox passenger ejected).

² *Ulrich v. New York Cent. R. Co.*, 108 N. Y. 80; 34 Am. & Eng. R. Cas. 350, reversing 13 Daly (N. Y.), 129; 31 Alb. L. J. 302. The court, speaking by RUGER, C. J., went on to say: "Perhaps the language of the court below will afford a more accurate view of its position [and the plaintiff's contention], viz.: 'The defendant has taken money from the plaintiff for carrying him, and it has no right to say that he was a free passenger, and to ask the court to incorporate into the drawing-room ticket the provisions of the free pass.' The vice of this argument is the assumption that 'the defendant has taken money from the plaintiff for carrying him.' Assuming, for the purposes of the argument, that the purchase, by a passenger on a train, of a drawing-room ticket from a drawing-room car conductor, has the same force and effect as though purchased from the train conductor, of which there is much doubt, we yet think that such a purchase has no effect upon the status of the purchaser as a passenger. . . . It is undoubtedly true that if the plaintiff had paid his fare, or had made a valid contract with the defendant for passage which was inconsistent with the provisions of the pass, it might be inferred that the parties intended by such an arrangement to rescind the contract previously existing between them, at least to the extent of any inconsistency. But we are of the opinion that the transaction in question had no such effect, and that the purchase of the right to enjoy particular and exclusive accommodations during the trip, whether made with the defendant or otherwise, did not, so long as the pass was used to secure transportation, in any way

was travelling on a free pass which had on it an indorsement to the effect that in consideration of receiving it the holder assumed all risks of accident, and agreed that the company should "not be liable under any circumstances, whether by the negligence of their agents or otherwise," for injury to his person or property. On getting aboard the train the passenger bought a ticket entitling him to a seat in a drawing-room car known as the "Empire." In the course of the journey a collision occurred in which he sustained severe injuries. He brought an action for damages against the railroad company, claiming that by the purchase of the ticket entitling him to a seat in the "Empire," he became a passenger for hire, and that the contract expressed in the free pass had been abrogated and annulled to a certain extent by the new contract. But the court held that this contention could not be sustained, that the contract of carriage as expressed in the free pass was conclusive as to the passenger's right of action. The price paid for admission to the parlor-car had no reference to the contract of transportation, but merely to privileges desired by one already entitled to transportation. "The contract for a seat did not make the purchaser a passenger in any sense, but it simply provided that if the purchaser secured a right to ride on that train he could also enjoy the advantages of a specified seat during the trip, if he so desired."

It has been urged that there is no reason why a passenger who has purchased a second-class ticket, entitling him to a passage in an emigrant-car, might not, by purchasing a ticket in a parlor-car, be entitled to be carried upon such ticket, although purchased at greatly reduced rates. But the company may and does require that its passengers shall hold first-class tickets; such a requirement is always provided for in the agreements between the railroad and the sleeping-car companies.

SEC. 369. Liability of Parlor-Car Companies for Articles Lost or Stolen. — It is quite true that a passenger upon an ordinary railway-car, takes the risk of the loss of any personal baggage or effects which he

affect the validity of the agreement expressed therein. Indeed, the terms printed upon the ticket by which the plaintiff secured his seat in the drawing-room car repel a contrary inference, and plainly indicate that the plaintiff was required to rely for transportation upon his pass; for it was there stated that 'this check, with passage-ticket or fare, will be taken up by

the conductor in charge of train.' The inference is irresistible that the ticket for a seat had no relation to his right to transportation, but that the latter was expected to be made the subject of a distinct and separate contract to be formed by an agreement between the plaintiff and the defendant."

may take with him into the car; and while he may sleep in his seat if he can, yet he does so at his peril; and if while sleeping thieves rob him of his money or baggage, the loss is his own, because the railway company has not contracted either expressly or impliedly to keep watch over his goods, either while he is asleep or awake;¹ but in sleeping-cars a different condition of things exists, and the very object and purpose of the cars, and the inducement which the company holds out to the public for taking passage in them, is, that passengers may sleep. In a recent case in Kentucky,² the court, in a very able opinion in which the liability of these companies is discussed, say: "These cars are in themselves an invitation to the travelling public to enter and protect themselves against the weariness of a long journey by disrobing and sleeping. The passenger in buying, and the company in selling, the ticket contemplate that this privilege will be improved. *The company accepting compensation under these circumstances impliedly undertakes to keep a reasonable watch over the passenger and his property.* The faithful performance of this undertaking is the limit of its duty in this respect. Its breach must be the foundation of every action seeking to charge the company with the loss of articles the passenger has taken with him

¹ *Hillis v. Chicago, &c. R. Co.*, 72 Iowa, 222 (railway company not liable for \$500 stolen from passenger in Pullman car). In the case of *Weeks v. New York, &c. R. Co.*, 9 Hun (N. Y.), 669, 72 N. Y. 50, the plaintiff had a verdict for \$16,685.47, which was the value, with interest, of certain bonds forcibly taken from him while he was a passenger on one of defendants' cars. The train had arrived at the station but was stopped shortly before it reached the ultimate landing-place, and plaintiff left his seat and walked to the end of the car to ascertain the cause of the detention. He was suddenly seized by three men who had just entered the car, and by them robbed of his bonds. No person employed by the company was in the car at the time, and no precautionary measures had been taken by it to protect its passengers against pillage. Another robbery was shown to have taken place near the same vicinity, but whether it was before or after this one did not appear. Upon these facts the trial court ruled that the plaintiff was entitled to recover the

value of the bonds taken from him, except one which was overdue and was afterwards returned; and the only point presented by the case was, whether that ruling was correct. It appeared that the plaintiff carried the bonds in an inside pocket, and that he gave no notice to the defendant or any of its agents of the fact that he had them. They were in no way placed under the charge of the defendant, but they were solely and wholly retained by the plaintiff. He made no contract with the company other than that to be deduced from his purchase of an ordinary passenger-ticket, and paid nothing for the safe carriage of the bonds in his possession unless it was included in the purchase-price of his ticket. The court held that the company was not liable. See opinion of DANIELS, J. (9 Hun. 670), which contains an able statement of the liability of railway companies in such cases.

² *Pullman Palace Car Co. v. Gaylord* Ky. Sup. Ct., 6 Ky. Law Rep. 279; 23 Am. L. Reg. n. s. 788.

upon the car. In the case at bar the defendant was held liable without regard to the faithfulness of its servants. *If they exercised proper care by keeping a reasonable watch over the plaintiff's property*, there was no breach of any undertaking on the part of the company, and hence no liability." This seems to us to be not only an accurate but a clear and concise statement of the duty of these companies in respect to the care which is due from them to their patrons, and it is the rule generally held.

In a recent Pennsylvania case,¹ the plaintiff purchased a ticket from the company at Philadelphia, which secured him an upper berth in a sleeping-coach leaving Philadelphia on the 11:30 P. M. train. There were on this train two sleepers in charge of five employes, the usual number, and consisting of a conductor, one cook, and three porters. The plaintiff on entering the car had on his person a gold watch valued at two hundred and fifty dollars, and about fifty-five dollars in money. His berth was already made up, and he retired shortly after the train started. Before getting into his berth he took off his coat and vest, put his watch and pocketbook in the inside pocket of his vest, and put it under the outside corner of the mattress of his berth, lay down and was soon asleep, and did not awake until near Huntingdon, about seven o'clock next morning, when the passenger conductor called for his railroad ticket. On looking for it he discovered that his watch and money were gone. He called the porter, and sent him to tell the conductor, who came, and the plaintiff made known to him that he had been robbed. Officers were telegraphed for and met the train at Tyrone to search the passengers, but the missing property was not found. Two passengers who had taken berths from Philadelphia to Altoona got off at Harrisburgh, and from this fact were suspected as being the guilty parties. Every effort was made by the agents and employes of the company to detect the thieves, but without avail. The conductor of the sleeper remained on duty in the coach until 3 A. M., when he left his post and put the colored porter upon guard, *who went out for a time to black boots. The regulations required a continuous watch during the night.* The plaintiff had a verdict for the amount of his loss, which was sustained upon appeal. In an Indiana case,² the plaintiff, who was a passenger upon one of the defendant's cars, while sleeping in his berth, was robbed of three hundred and ninety-six dollars, as

¹ Pullman Palace Car Co. v. Gardner ² Woodruff Sleeping Car Co. v. Diehl,
(Penn. 1883), 16 Am. & Eng. R. Cas. 324. 84 Ind. 474; 43 Am. Rep. 102.

the court trying the case, at the request of the parties, specially found, through the negligence of the defendant in not maintaining a sufficient watch over the cars during the night to prevent thefts. The court upon these facts, stated its conclusions of law therefrom, as follows: (1) That the defendant is not responsible as a common carrier; (2) That the defendant cannot be held to the liability of an innkeeper, but for negligence only, and that upon the facts, *it having failed to keep a sufficient watch during the night*, it was liable for the loss, and rendered judgment for the plaintiff for three hundred and ninety-six dollars. Upon appeal, the Supreme Court sustained the lower court as to its conclusions of law, and the judgment was affirmed.¹ A notice posted in the car that the company disclaims all responsibility for the loss of baggage, or other property of passengers, cannot affect the company's liability unless it can be shown that it was brought to the passenger's notice;² and it seems that

¹ In *Pullman Palace Car Co. v. Gaylord*, Ky. Sup. Ct. 6 Ky. Law Rep. 279; 23 Am. L. Reg. n. s. 788, it was held that in the absence of proof of negligence, a sleeping-car company is not liable for a diamond pin stolen from the berth of a passenger. The court, citing *Clark v. Burns*, 118 Mass. 275; 19 Am. Rep. 456, and *Steamboat Crystal Palace v. Vanderpoel*, 16 B. Mon. (Ky.) 302, said: "It would be difficult to give any valid reason why a sleeping-car company should be held to any more rigid liability in such cases than a steamboat company. It could no more be said that a sleeping-car was an 'inn on wheels' than that a steamboat was an inn on water. They both provide sleeping-apartments for passengers, who pay for the privilege, and are expected to occupy them. Sleep is as essential to the health and comfort of the traveller in the one case as in the other. The servants of the steamboat company certainly have the implied custody of the passenger's wearing apparel to as great an extent as the servants of the sleeping-car company. The resemblance of a steamboat to an inn is even greater than that of the sleeping-car, since it is customary for the former to provide meals for its passengers. If, then, the rigid liability of innkeepers is not to be extended to the owners of steamboats,

common justice demands that it be not applied to the owners of sleeping-cars. And we find this rule has been followed so far as the responsibilities of the latter have been the subject of judicial inquiry. While these adjudications are not placed upon the same ground, their conclusions are substantially the same. We cannot concur in some of the reasons assigned in the various opinions, but we think their decisions are, in the main, correct." The court also remarked upon *Blum v. Pullman Sleeping Car Co.*, 3 Cent. Law Jour. 592; *Palmer v. Wagner*, 11 Alb. Law Jour. 149; *Welsh v. Pullman Palace Car Co.*, 16 Abb. Pr. n. s. (N. Y.) 252; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; *Woodruff Pal. Car Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102, and concluded as follows: "While therefore the stringent liability of an innkeeper, which the distinguished Chief Justice COLERIDGE has said does not 'stand on mere reason, but on custom growing out of a state of society no longer existing,' is not to be applied to the owners of sleeping-cars, it does not follow that they assume no duties or liabilities."

² *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; 58 Am. Rep. 135; 28 Am. & Eng. R. Cas. 148.

even then the notice is ineffectual to relieve the company of all liability for the consequences of its negligence.

These cases and others establish beyond question the doctrine that a sleeping-car company is not liable as a common carrier or as an innkeeper for the baggage or other effects of its passengers, and therefore does not insure against their loss. But while this is true, it owes a clear duty to use reasonable care to protect passengers from theft, and if through the want of such care the passengers' personal effects are stolen, it must answer for their loss.¹ The company's liability being based on its negligence, the contributory negligence of the plaintiff is always a defence.²

The sleeping-car company is not only not liable as an insurer of the effects of its passengers, but its liability for losses occasioned by its own negligence is limited to such an amount of money or other effects as is reasonably necessary for the purposes of the passenger's journey. The rule is very clearly stated in the opinion by THOMPSON, J., of the Missouri Court of Appeals: ³ "The settled law is that a sleeping-car company is not an insurer of the baggage of the passenger, but that its liability at most is that of a bailee for hire. In

¹ *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 150; *Pullman Car Co. v. Pollock*, 69 Tex. 123; *Dargan v. Pullman Car Co.* (Tex. 1885), 26 Am. & Eng. R. Cas. 149; *Carpenter v. New York, &c. R. Co.*, 124 N. Y. 54 (mere proof of loss does not make up *prima facie* case against the company); *Pullman Car Co. v. Smith*, 73 Ill. 360; *Welch v. Pullman Car Co.*, 43 N. Y. Super. Ct. 457 (compare the dissenting opinion of SMITH, J.); *Hillis v. Chicago, &c. R. Co.*, 72 Iowa, 228; 31 Am. & Eng. R. Cas. 108; *Tracy v. Pullman Pal. Car Co.*, 67 How. Pr. (N. Y.) 154; *Stearn v. Pullman Car Co.*, 8 Ont. Rep. 171; 21 Am. & Eng. R. Cas. 443. In a single case the doctrine of the text has been objected to and the rule laid down that "a sleeping-car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities." *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 243. In this case the property stolen had been intrusted by the passenger to the porter, who made away with it. The case is conceded to be opposed to the weight of authority.

Negligence on the part of the company

cannot be presumed from the fact that the loss occurred. *Root v. N. Y. Sleeping Car Co.*, 28 Mo. App. 199; *Tracy v. Pullman Car Co.*, 67 How. Pr. (N. Y.) 154; *Carpenter v. New York, &c. R. Co.*, 124 N. Y. 53; 21 Am. St. Rep. 644; 47 Am. & Eng. R. Cas. 421; *Pullman Car Co. v. Pollock*, 69 Tex. 120; 34 Am. & Eng. R. Cas. 217. An admission by the porter in charge of the sleeping-car made after a theft from the berth of a passenger had been accomplished, but before the journey had ended, is not admissible against the company on the issue of whether such theft resulted from its negligence. *Carpenter v. New York, &c. R. Co.*, 13 N. Y. State Rep. 17.

² *Hillis v. Chicago, &c. R. Co.*, 72 Iowa, 228; 31 Am. & Eng. R. Cas. 108; *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 148; *Whitney v. Pullman Pal. Car Co.*, 143 Mass. 243; *Barrott v. Pullman Palace Car Co.*, 51 Fed. Rep. 796; *Welch v. Pullman Car Co.*, 16 Abb. Pr. N. S. (N. Y.) 352.

³ *Root v. New York Central Sleeping Car Co.*, 28 Mo. App. 199, 205.

the case of a loss of the passenger's baggage or belongings it is, therefore, liable, if at all, only on the ground of negligence; and in order to be so liable, it must have been negligent in the performance of some duty which it assumed to perform for a passenger. That duty so far as adjudged cases seem to have gone, is that it will maintain in the car a reasonable watch during the night while the passenger is asleep. We now go further, and, speaking with reference to the facts of this case, we hold that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot reasonably take with him nor watch himself while he is absent from his berth in the washing-room, preparing his toilet after arising in the morning. This duty of watchfulness extends so far as to make the sleeping-car company liable for a negligent failure to perform it to the extent of any baggage or personal belongings which the passenger may thereby lose, which are reasonably necessary to be taken by him on his journey, regard being had to his station in life, and to the length, purposes, and probable duration of the journey.¹ Nor does this implied undertaking include a large sum of money; it cannot cover more than a reasonable amount, necessary to pay travelling expenses.² . . . Beyond the amount of baggage or money which it is thus reasonably necessary for the traveller to take with him, the sleeping-car company assumes no duty of watchfulness, and is under no liability in case of loss or theft. It is not even a gratuitous bailee in respect of such excess of money or baggage, nor is its position even that of a warehouseman who furnishes house-room merely without assuming any duty of watchfulness." And this view so clearly set forth is sustained by other well considered cases.³

The liability of the company being based on negligence, the con-

¹ *Wilson v. Balt., &c. R. Co.*, 32 Mo. App. 682; *Spooner v. Hannibal, &c. R. Co.*, 23 Mo. App. 403; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Merrill v. Grinnel*, 30 N. Y. 594; *Parmalee v. Fisher*, 22 Ill. 212; *Dibble v. Brown*, 12 Ga. 217; *Brock v. Gale*, 14 Fla. 523; *Johnson v. Stone*, 11 Humph. (Tenn.) 419; *Jordan v. Fall River Co.*, 5 Cush. (Mass.) 69; *Weed v. Saratoga, &c. R. Co.*, 19 Wend. (N. Y.) 534; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 116; *Helleman v. Holladay*, 1 Woolw. (U. S.) 365.

² *Whitmore v. Steamboat*, 20 Mo. 513, 518; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 116.

³ *Wilson v. Baltimore, &c. R. Co.*, 32 Mo. App. 682 (if there is no evidence as to what is such reasonable amount the verdict must be for nominal damages only); *Florida v. Pullman Car Co.*, 37 Mo. App. 600; *Hampton v. Pullman Pal. Car Co.*, 42 Mo. App. 135; *Hillis v. Chicago, &c. R. Co.*, 72 Iowa, 228; 31 Am. & Eng. R. Cas. 108.

tributory negligence of the passenger is, of course, a defence. But a passenger's negligence in leaving his effects exposed, and where they are liable to be stolen, is not such contributory negligence as will bar his recovery where the theft is by an employé of the company; his negligence would not amount to a proximate cause of the injury. "The duty of the defendant through its servants would be to protect the passenger's property, although discovered in an exposed situation where his carelessness may have left it."¹ This is from analogy to the rule that even though a plaintiff negligently exposes himself to danger, yet the defendant is liable if after discovering his dangerous position it fails to exercise care to prevent injury to him.²

SEC. 369 a. Obligation to Receive Passengers. — The sleeping-car companies do not differ essentially in their duties and liabilities to passengers from ordinary railroad companies; both are carriers of passengers, bound to the exercise of the highest care in the discharge of their duties to their passengers, though this duty is more extensive in the latter case than in the former. There is no difference in the character of their liability for the baggage of passengers; the sleeping-car company is liable only when the loss is attributable to its negligence, but this arises from the fact that the passenger retains control of his effects in their cars; under the same conditions the liability of the railway company is the same. It would seem, therefore, that, like railway companies, sleeping-car companies are bound to furnish equal facilities to all who apply to them, and tender compliance with their reasonable regulations. It cannot refuse passage to any passenger from motives of prejudice, or for any reason except that its accommodations are full, or that the applicant is not a proper

¹ *Root v. Sleeping Car Co.*, 28 Mo. App. 207-208; *Pullman Car Co. v. Matthews*, 74 Tex. 654. When train stopped at the station plaintiff left the car for dinner, leaving his satchel upon the sill of a car-window where it was within reach of persons outside. Held that he was guilty of contributory negligence which would bar recovery by him in an action against the company. *Whitney v. Pullman Car Co.*, 143 Mass. 243. In *Wilson v. Balt., &c. R. Co.*, 32 Mo. App. 686, it was held that the passenger was "grossly" negligent in leaving a large sum of money in his vest-pocket under his pillow while

he went to the water-closet, and that such negligence would bar his recovery. According to the Missouri rule contributory negligence is an affirmative defence, and before plaintiff can be debarred of his recovery on that ground, the evidence adduced by him must be such that the facts raise an unavoidable inference of negligence on his part. *Florida v. Pullman Car Co.*, 37 Mo. App. 600.

² *Tuff v. Warman*, 2 C. B. N. s. 740; *affirmed*, 5 C. B. N. s. 573; 94 E. C. L. 573; *Bell v. Hannibal, &c. R. Co.*, 86 Mo. 599; *ante*, p. 1451.

person to be carried. And this has been distinctly declared to be the rule.¹ The ground upon which this obligation rests *grows out of the obligation of the railway company to the travelling public, and of the relation of the palace-car company to the railway company.* Railway companies as common carriers of passengers are bound to furnish equal facilities and accommodations to all passengers, as they are to all freighters; and inasmuch as these cars comprise a part of its train, although not owned by the railway company, nevertheless *they must be subject to the obligations which the law imposes upon the railway company, in reference to its cars and the equal accommodations and facilities therein which the railway company is bound to afford its passengers*; and the palace-car company must at least be regarded as impliedly contracting that it will be subject to these obligations. In our judgment, upon no other ground could the railway company justify the hauling of these cars, as a constant part of its trains.²

A railroad company attaching a chair-car to its train may provide that no passenger holding an ordinary ticket shall ride thereon except upon the payment of extra fare, and may enforce such provision by expelling those who refuse to comply with it, and insist on riding there free of extra charge.³

The sleeping-car company has the right to sell a section of the car to a certain passenger for a specified journey, and it cannot be held liable for a refusal to allow a passenger who boarded the train before the journey was over to occupy one of the berths in such section, even though it was vacant.⁴

In a case before the Supreme Court of New York,⁵ a passenger

¹ *Nevin v. Pullman Car Co.*, 106 Ill. 222; 46 Am. Rep. 688; 11 Am. & Eng. R. Cas. 92. See *ante*, § 297, as to the obligation of a railroad company to receive and carry passengers.

² See *Nevin v. Pullman Car Co.*, 106 Ill. 222; 11 Am. & Eng. R. Cas. 92; 48 Am. Rep. 688. The company may, however, insist upon compliance with its reasonable regulations before furnishing its accommodations. Therefore where a regulation existed that a sleeping berth between certain points should not be furnished to any except those holding through tickets between those points, the employes were justified in refusing a berth to one holding a ticket to an intermediate station only, and plaintiff could recover no damages on

the ground that he was unjustly moved into another coach. *Lawrence v. Pullman Car Co.*, 144 Mass. 1; 28 Am. & Eng. R. Cas. 151.

³ *St. Louis, &c. R. Co. v. Hardy*, 55 Ark. 134; 17 S. W. Rep. 711. The rule of the text is true only where the company has provided sufficient ordinary accommodations for all passengers. The fact that the company had advertised that it would run chair-cars on certain trains, did not warrant the inference that such cars would be free of extra charge. *St. Louis, &c. R. Co. v. Hardy*, 55 Ark. 134.

⁴ *Searles v. Mann Boudoir Co.*, 45 Fed. Rep. 339.

⁵ *Buck v. Webb*, 58 Hun (N. Y.), 185.

having lost his sleeping-car ticket, the agent declined to give him another, but gave him his personal card with the statement therein: "This gentleman holds seat in 'Nokomis' this P. M. Mislaid, C. E. Benedict." With this card and his passage-ticket the passenger took his seat in the palace-car "Nokomis," and when called upon by the conductor for his palace-car ticket, offered him the card with explanations. The conductor refused to recognize the card, and compelled him to go into an ordinary car. In an action for damages, it was held that he was entitled to recover.

CHAPTER XXIII.

'LIABILITY TO EMPLOYÉES.

SEC. 370. Risks assumed by Employés.

- 371. Remaining in Service after Knowledge of Defects, not Negligence *per se*.
- 372. Servant must exercise his Judgment : should report Defects.
- 373. What Care Company must exercise.
- 374. Duty of Company to inspect Appliances.
- 375. Degree of Care required of the Master.
- 376. Master is presumed to have discharged his Duty.
- 377. Company liable for Acts of Agents, when.
- 378. Not bound to Adopt Latest Improvements.

SEC. 379. When Patent Defects do not excuse Master's Liability.

- 380. Inexperienced Employés : New Risks, etc.
- 380 *a*. Change of Employment.
- 381. Employment of Insufficient Number of Servants.
- 382. Duty of Company to establish Rules.
- 383. Using Machinery Improperly or for Improper Purpose.
- 384. Master's Exemption extends only to Time of Actual Service.
- 385. Receiver of Railway liable as Master.
- 386. What the Servant must establish.
- 387. How Master may relieve himself from Liability.

SEC. 370. **Risks assumed by Employés.**—It is now universally held that when a person enters into the employment of another, he assumes all the risks ordinarily incident to such employment, and for injuries resulting to him therefrom, there is, at the common law, no ground of recovery.¹ "Servants," said Lord CRANWORTH, "must

¹ Wood's Law of Master and Servant, Chap. XV.; Priestley v. Fowler, 3 M. & W. 1; Chicago, &c. R. Co. v. Ross, 112 U. S. 377; Indianapolis, &c. R. Co. v. Flanagan, 77 Ill. 365; Cazger v. Taylor, 10 Gray (Mass.), 274; Seaver v. Boston, &c. R. Co., 14 Gray, 466; Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; Coombs v. New Bedford Co., 102 Mass. 572; 3 Am. Rep. 506; Kenney v. Shaw, 133 Mass. 501; Marquette, &c. R. Co. v. Taft, 23 Mich. 289; Patterson v. Pittsburgh, &c. R. Co., 76 Penn. St. 389; 18 Am. Rep. 412; Green Street, &c. R. Co. v. Coates, 97 Penn. St. 103; Nashville, &c. R. Co. v. Elliott, 1 Coldw. (Tenn.)

612; O'Neil v. St. Louis, &c. R. Co., 3 McCrary (U. S.), 423; 9 Fed. Rep. 337. A servant assumes the risk naturally and reasonably incident to his employment. He is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. Hayden v. Smithville Mfg. Co., 29 Conn. 548. It is the voluntary assumption of risk on the part of the servant which withholds from him a right of action. Harkins v. N. Y. Central R. Co., 65 Barb. (N. Y.) 129; Dillon v. Sixth Ave. R. Co., 48 N. Y. Super. Ct. 283; Sykes v. Parker, 99 Penn. St. 465; Baker v. Western, &c. R.

be supposed to have the risk of the service in their contemplation when they *voluntarily* undertake it, and agree to accept the stipulated remuneration. This, however, supposes that the master has secured proper servants and proper machinery for the conduct of the work."¹ "A person is not bound to enter a particular service," says

Co., 68 Ga. 699; Missouri, &c. R. Co. v. Lyde, 57 Tex. 505; Watson v. Houston, &c. R. Co., 58 Tex. 434; Umbach v. Lake Shore, &c. R. Co., 83 Ind. 191; Chicago, &c. R. Co. v. Clark, 11 Ill. App. 104; Chicago, &c. R. Co. v. Jones, 11 Ill. App. 324; Chicago, &c. R. Co. v. Simmons, 11 Ill. App. 147; 11 Ill. App. 516; Wabash, &c. R. Co. v. Fenton, 12 Ill. App. 417; Henry v. Lake Shore, &c. R. Co., 49 Mich. 495; Morse v. Minneapolis, &c. R. Co., 30 Minn. 465; Memphis, &c. R. Co. v. Jones, 2 Head (Tenn.), 517; Summerhays v. Kansas, &c. R. Co., 2 Col. 484; Laning v. N. Y. Central R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Strahlendorf v. Rosenthal, 30 Wis. 674; Noyes v. Smith, 28 Vt. 59; Frazier v. Penn. R. Co., 38 Penn. St. 104; Owen v. N. Y. Central R. Co., 1 Lans. (N. Y.) 108; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Wright v. N. Y. Central R. Co., 25 N. Y. 562; Mad River, &c. R. Co. v. Barber, 5 Ohio St. 541; Baltimore, &c. R. Co. v. Woodward, 41 Md. 298; Moss v. Johnson, 22 Ill. 642; DeWitt v. Railroad Co., 50 Mo. 302; Piper v. Railroad Co., 1 T. & C. (N. Y.) 290; Salters v. Del. & Hud. Canal Co., 5 T. & C. (N. Y.) 559; Bartonshill Coal Co. v. Reid, 3 Macq. (Sc.) 265; Priestley v. Fowler, 3 M. & W. 1; Griffiths v. Gidlow, 3 H. & N. 648; Seymour v. Maddox, 16 Q. B. 326; Couch v. Steel, 24 Eng. L. & Eq. 77; Snow v. Housatonic R. Co., 8 Allen (Mass.), 44; Clarke v. Holmes, 7 H. & N. 937; Hutchinson v. Ry. Co., 5 Exchq. 352; Hathaway v. Michigan Central R. Co., 51 Mich. 253; Davis v. Detroit, &c. R. Co., 45 Mich. 212; Swoboda v. Ward, 40 Mich. 420; Chicago, &c. R. Co. v. Bayfield, 37 Mich. 205; Quincy Mining Co. v. Kitts, 42 Mich. 34; Michigan Central R. Co. v. Smithson, 45 Mich. 212; Illinois, &c. R. Co. v. Flanagan, 77 Ill. 365; Way v. Ill. Central R. Co., 40 Iowa, 341; Baldwin v. Chicago, &c. R.

Co., 50 Iowa, 680; Northern Central R. Co. v. Husson, 101 Penn. St. 1; 47 Am. Rep. 690; Pittsburgh, &c. R. Co. v. Seutmeyer, 92 Penn. St. 276; 37 Am. Rep. 384; Baker v. Allegheny, &c. R. Co., 95 Penn. St. 215; 40 Am. Rep. 634; Day v. Toledo, &c. R. Co., 42 Mich. 523; Atchison, &c. R. Co. v. Plunkett, 25 Kan. 188; Gunter v. Graniteville Mfg. Co., 15 S. C. 443; De Graff v. N. Y. Central R. Co., 76 N. Y. 125; North Chicago Rolling Mills v. Monks, 4 Brad. (Ill.) 664; Price v. Henagon, 5 Brad. (Ill.) 234; Potts v. Port Carlisle, &c. Ry. Co., 27 L. T. N. s. 283; Mobile, &c. R. Co. v. Thomas, 42 Ala. 572; Leonard v. Collins, 70 N. Y. 90; Colorado, &c. R. Co. v. Ogden, 3 Cal. 499; Steffen v. Chicago, &c. R. Co., 46 Wis. 259; Holden v. Fitchburg R. Co., 129 Mass. 530; 39 Am. Rep. 398; Wonder v. Baltimore, &c. R. Co., 32 Md. 511; Hanrathy v. Northern Central R. Co., 48 Md. 280; Baltimore, &c. R. Co. v. Stricker, 51 Md. 47; Smith v. St. Louis, &c. R. Co., 69 Mo. 32; Chicago, &c. R. Co. v. Scheuring, 4 Brad. (Ill.) 533; Columbus, &c. R. Co. v. Barber, 5 Ohio St. 541; Chicago, &c. R. Co. v. Mahoney, 4 Brad. (Ill.) 262; Columbus, &c. R. Co. v. Webb, 12 Ohio St. 475; Chicago, &c. R. Co. v. Platt, 89 Ill. 141; Grand Rapids, &c. R. Co. v. Huntly, 38 Mich. 237; Indianapolis, &c. R. Co. v. Lane, 10 Ind. 554; Columbus, &c. R. Co. v. Arnold, 31 Ind. 147; Indianapolis, &c. R. Co. v. Tay, 91 Ill. 474; Toledo, &c. R. Co. v. Ingraham, 77 Ill. 309.

¹ Bartonshill Coal Co. v. Reid, 3 Macq. 275-284. Where a brakeman, on going into the employment of a railway company, signs a contract binding him to obey all orders, rules, and regulations, but in which the general language applies equally to all classes of employés, the contract to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed;

COLERIDGE, J.,¹ "and, if he does, he must take things as he finds them." "A person must make his own choice," says ERLE, J., in the same case, "whether he will accept employment on premises in this condition; and-if he do accept such employment, he must also make his own choice whether he will pass along a floor in the dark or carry a light. If he sustains injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." Thus it will be seen that the servant not only assumes all risks ordinarily incident to the business, but also *all other open and visible risks, whether usually incident to the business or not*; and if he knows of such defects, the circumstance that he had forgotten the fact of their existence will not help his case.² The master is bound to the exercise

and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom. And while the clause binding him to use care and caution applies to anything he may undertake to do, it is for the jury to decide whether he has violated it. *Jones v. Lake Shore, &c. R. Co.*, 49 Mich. 573; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; *Naylor v. Chicago, &c. R. Co.*, 53 Wis. 661; *Chicago, &c. R. Co. v. Donahue*, 75 Ill. 106; *Skip v. Eastern Counties Ry. Co.*, 9 Exch. 223.

The fact that the servant injured was a minor does not affect the rule of the text, unless he was a child of tender years. *Houston, &c. R. Co. v. Miller*, 51 Tex. 270; *Robinson v. Houston & Texas Central R. Co.*, 46 Tex. 540; *Gartland v. Toledo, &c. R. Co.*, 67 Ill. 498; *King v. Boston, &c. R. Co.*, 9 Cush. (Mass.) 112; *Nashville, &c. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611, 619; *McGinnis v. Canada, &c. Co.*, 49 Mich. 466; 8 Am. & Eng. R. Cas. 135. See, however, *post*. But the principle that an employé assumes the risks of the negligence of his co-employés does not apply as to the employés of a connecting line. *Philadelphia, &c. R. Co. v. State*, 58 Md. 372. Where a railroad company is in the habit of constantly taking damaged cars from one station to another for repair, and a person is employed to couple and switch such cars, and while so engaged he is injured in attempting to couple a car to the train,

by reason of the broken condition of the car, it was held that the presumption is that he undertook the employment subject to all of the risks incident to the place, and that this was one of the risks he expected to incur when he accepted the employment. *Chicago, &c. R. Co. v. Ward*, 61 Ill. 310. An employé engaged in digging a well is held to assume the risks incident thereto. *Galveston, &c. R. Co. v. Lempe*, 59 Tex. 19; 11 Am. & Eng. R. Cas. 201.

¹ *Seymour v. Maddox*, 16 Q. B. 326.

² *Wood's Law of Master and Servant*, 680; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Priestley v. Fowler*, 3 M. & W. 1. In *Ladd v. New Bedford R. Co.*, 119 Mass. 412, the plaintiff was injured while riding upon one of the defendant's trains. He was a road-master in the defendant's employ, and the injury for which he sought to recover was received by reason of a defective switch, and a lack of proper check-chains on the cars. It appeared that the defect in the switch was a latent one, and that the plaintiff knew that some of the company's cars were deficient in respect of check-chains, and that such deficiency rendered their use dangerous. It did not appear that the plaintiff knew that the car in which he was riding was deficient in that respect, but it did appear that *he did not think to look to see whether it was or not until after the accident*. He was held to be remediless. *Priestley v. Fowler*, 3 M. & W. 1; *Skipp v. Eastern Counties R.*

of reasonable care in reference to all the appliances of the business, and is bound to protect his servants from injury therefrom by reason of *latent or unseen defects*, so far as reasonable care can accomplish that result; but he does not stand in the relation of an insurer to the servant against injury, and can only be held chargeable when negligence can properly be imputed to him.¹ The mere fact that an acci-

Co., 9 Exch. 223; Seymour v. Maddox, 16 Q. B. 326; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Sullivan v. India Mfg. Co., 113 Mass. 396; Dillon v. Union Pacific R. Co., 3 Dill. (U. S.) 319; Snow v. Housatonic R. Co., 8 Allen (Mass.), 441; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Clarke v. Holmes, 7 H. & N. 937; Holmes v. Worthington, 2 F. & F. 533; Patterson v. Pittsburgh, &c. R. Co., 76 Penn. St. 389; Dynen v. Leach, 26 L. J. N. S. Exch. 221; Assop v. Yates, 2 H. & N. 768; Griffiths v. Gidlow, 3 id. 348.

¹ Wood's Law of Master and Servant, Chap. XV.; Brown v. Accrington Spinning Co., 3 H. & C. 511; Hackett v. Middlesex Mfg. Co., 101 Mass. 101. He does not warrant the servant's safety, nor guarantee that the appliances may not prove defective. *He only stipulates to use reasonable care to prevent such a result.* Tinney v. Boston, &c. R. Co., 62 Barb. (N. Y.) 218; Riley v. Baxendale, 6 H. & N. 445; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Cayzer v. Taylor, 10 Gray (Mass.), 274; Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; Hoffnagle v. Railroad Co., 1 T. & C. (N. Y.) 345; Columbus R. Co. v. Arnold, 31 Ind. 174; Columbus, &c. R. Co. v. Troesch, 68 id. 545; Wright v. N. Y. Central R. Co., 25 N. Y. 562; Gibson v. Pacific R. Co., 46 Mo. 163. It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants and workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of those they could not foresee. The legal implication is, that the employer will adopt suit-

able instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. Snow v. Housatonic R. Co., 8 Allen (Mass.), 441, per BIGELOW, C. J.; Cayzer v. Taylor, 10 Gray (Mass.), 274; Seaver v. Boston, &c. R. Co., 14 id. 466. Any other rule would be productive of great injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer. King v. N. Y. Central R. Co., 4 Hun (N. Y.), 769; Mad River, &c. R. Co. v. Barber, 5 Ohio St. 541; Bridges v. St. Louis, &c. R. Co., 6 Mo. App. 389; Chicago, &c. R. Co. v. Shannon, 43 Ill. 338; Harney v. N. Y. Central R. Co., 19 Hun (N. Y.), 556; Dorsey v. Railroad Co., 42 Wis. 583; Flanagan v. Railroad Co., 45 id. 98; 50 id. 462; Leonard v. Collins, 70 N. Y. 90; Bisel v. N. Y. Central R. Co., 70 N. Y. 571; Keegan v. Western R. Co., 8 N. Y. 175; De Forest v. Jewett, 19 Hun (N. Y.), 509; Houston, &c. R. Co. v. Oram, 49 Tex. 341; Toledo, &c. R. Co. v. Moore, 77 Ill. 217; Bessex v. Chicago, &c.

dent occurs by which a servant is injured, does not fix his liability or raise a presumption, even, that he was at fault. Actual negligence upon his part must be both alleged and proved, and negligence which establishes a breach of his implied duty to the servant. So, too, it must appear that the servant was not himself at fault, in such a respect as renders him amenable to the charge of having by his own negligence contributed to the injury. The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the skill and care of his master.¹ And where the defect is obvious, if he puts himself in a position to be injured through it, the fault and the consequences are his own.² But

R. Co., 45 Wis. 477; Toledo, &c. R. Co. v. Ingraham, 77 Ill. 309; Wedgewood v. Chicago, &c. R. Co., 41 Wis. 478; Brickman v. So. Carolina R. Co., 8 S. C. 173; Toledo, &c. R. Co. v. Asbury, 77 Ill. 309; Plank v. N. Y. Central R. Co., 1 T. & C. (N. Y.) 319; Stevenson v. Jewett, 16 Hun (N. Y.), 310. In Brown v. Chicago, &c. R. Co., 53 Iowa, 595, 36 Am. Rep. 243, it was held that a brakeman can recover of a railway company for an injury received from its failure to have its cars inspected. See also Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Cowles v. Richmond, &c. R. Co., 84 N. C. 309; 37 Am. Rep. 620; Hough v. Texas, &c. R. Co., 100 U. S. 213; Haskins v. Standard Sugar Refinery, 122 Mass. 400; Cooper v. Central R. Co., 44 Iowa, 134. As to liability for injuries from unsafe cow-catchers, see Indianapolis, &c. R. Co. v. Estes, 95 Ill. 470; unsafe deadwoods, — Toledo, &c. R. Co. v. Black, 88 Ill. 112; defective ladders on freight trains, — Toledo, &c. R. Co. v. Ingraham, 77 Ill. 309; Chicago, &c. R. Co. v. Platt, 89 Ill. 141; Jones v. N. Y. Central R. Co., 62 How. Pr. (N. Y.) 450; defective brakes, — Brown v. Gt. Western Ry. Co., 40 U. C. Q. B. 333; Chicago, &c. R. Co. v. Hagan, 11 Brad. (Ill.) 498; Chicago, &c. R. Co. v. Bragoneer, 11 id. 516; Johnson v. Richmond, &c. R. Co., 81 N. C. 453; De Graff v. N. Y. Central R. Co., 76 N. Y. 125; defective derricks, — Baker v. Allegheny, &c. R. Co., 95 Penn. St. 211; Deroschler v. Lehigh Valley R. Co., 87 N. Y. 636; King v. N. Y. Central R. Co., 72 N. Y. 607; Kansas, &c. R. Co. v. Little,

19 Kan. 267; defective brake-beam, — Wedgewood v. Chicago, &c. R. Co., 41 Wis. 478; 44 id. 44; double buffers, — Indianapolis, &c. R. Co. v. Flanagan, 77 Ill. 365; check-chains, — Ladd v. New Bedford R. Co., 119 Mass. 412; draw-bars, — Whitman v. Wisconsin, &c. R. Co. (Wis.), 12 Am. & Eng. R. Cas. 1883; cars of unequal height, — Halett v. St. Louis, &c. R. Co., 67 Mo. 239; Hodgkins v. Eastern R. Co., 119 Mass. 419; Botsford v. Michigan Central R. Co., 33 Mich. 256; Fort Wayne, &c. R. Co. v. Gildersleeve, 33 Mich. 133; Indianapolis, &c. R. Co. v. Toy, 91 Ill. 474; Michigan Central R. Co. v. Smithson, 45 Mich. 212; Conway v. Illinois Central R. Co., 50 Iowa, 465; Galveston, &c. R. Co. v. Delahunty, 53 Tex. 206; Lake Shore, &c. R. Co. v. McCormick, 74 Ind. 440; Wabash, &c. R. Co. v. Fenton, 12 Brad. (Ill.) 417; Muldowney v. Illinois Central R. Co., 36 Iowa, 462; Jones v. N. Y. Central R. Co., 22 Hun (N. Y.), 284; Louisville, &c. R. Co. v. Orr, 84 Ind. 50; Palmer v. Denver, &c. R. Co., 3 McCrary (U. S.), 635; Missouri Pac. R. Co. v. Lyde, 57 Tex. 505; Wedgewood v. Chicago, &c. R. Co., 44 Wis. 44; Chicago, &c. R. Co. v. Mahoney, 4 Ill. App. 262.

¹ Atchison, &c. R. Co. v. Plunkett, 25 Kan. 288; Cowles v. Richmond, &c. R. Co., 84 N. C. 309; 37 Am. Rep. 620; Walsh v. St. Paul, &c. R. Co., 27 Minn. 367; Baltimore, &c. R. Co. v. Jones, 95 U. S. 443.

² In Hathaway v. Mich. Central R. Co., 51 Mich. 253; 47 Am. Rep. 569, a

it is not necessarily negligence in an employé, when called upon to do an act suddenly and quickly, not to see a patent defect. Thus, a brakeman called upon to connect cars has a right to presume that the bumpers and all the appliances for connecting the cars are in a proper and safe condition; and if he rushes in to connect the cars when such appliances are in an unsafe condition, which he might have seen if he had taken time to examine them, his act cannot be said to be *per se* negligence.¹ Under such circumstances he has a right to assume that the company has discharged its duty, and is not bound to stop to look to see whether the bumpers or other appliances are safe.² To hold that an employé in a sudden emergency must stop to deliberately inspect the appliances with which he has to deal, would be to apply to him a rule which could not be practically applied. And where the danger is not patent, he has a right to presume that the master has discharged his duty, and that the appliances of the business are reasonably safe and free from hazard.³

failure by an employé engaged in coupling cars to examine as to the nature of "dead-woods" upon cars with which he had to do, was held contributory negligence preventing a recovery against the company employing him, for injury from such "deadwoods" while at work. *Davis v. Detroit, &c. R. Co.*, 20 Mich. 105; *Central R. & B. Co. v. Roach*, 64 Ga. 635; *Tenn., &c. R. Co. v. Rush*, 15 Lea. (Tenn.), 145; *Atlas Engine Works v. Randall*, 100 Ind. 293; 50 Am. Rep. 798; *English v. Chicago, &c. R. Co.*, 24 Fed. Rep. 906; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212; *Swoboda v. Ward*, 40 Mich. 423; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212; *Chicago, &c. R. Co. v. Bayfield*, 37 Mich. 205; *Indiana, &c. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Chicago, &c. R. Co.*, 50 Iowa, 680; *Way v. Illinois Cent. R. Co.*, 40 Iowa, 341; *Chicago, &c. R. Co. v. Ward*, 61 Ill. 131.

¹ *King v. Ohio, &c. R. Co.*, 14 Fed. Rep. 277; *Hosie v. Chicago, &c. R. Co.*, 75 Iowa, 683; *Kelley v. Chicago, &c. R. Co.*, 50 Wis. 381.

² *Fort Wayne, &c. R. Co. v. Gildersleeve*, 33 Mich. 133; *Botsford v. Michigan, &c. R. Co.*, 33 Mich. 256; *Totten v. Penn. R. Co.*, 11 Fed. Rep. 564; *Bryden v. Stewart*, 2 Macq. (Sc.) 30; *Roberts v.*

Smith, 2 H. & N. 213; *Williams v. Clough*, 3 H. & N. 259; *Mad River, &c. R. Co. v. Barber*, 5 Ohio St. 541.

³ *Michigan, &c. R. Co. v. Dolan*, 32 Mich. 510; *Speed v. Atlantic, &c. R. Co.*, 71 Mo. 303; *Wood v. Mississippi R. Co.*, 50 Miss. 178; *Cone v. Delaware, &c. R. Co.*, 81 N. Y. 206; *Bradbury v. Goodwin*, 108 Ind. 286. He has a right to assume that when he is placed in a position of danger, where engrossing duties are required of him, that the employer will not, without proper warning, subject him to unknown perils from which his work necessarily distracts his attention. *Coombs v. New Bedford Co.*, 102 Mass. 572; *Atlas Engine Works v. Randall*, 100 Ind. 293; 50 Am. Rep. 798. The question of the company's negligence is for the jury. *Brann v. Chicago, &c. R. Co.*, 53 Iowa, 595. It is its duty to exercise ordinary care for the inspection of its own locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required. *Smoot v. Mobile, &c. R. Co.*, 67 Ala. 13. It is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery

The rule announced in the cases previously cited, does not mean, however, that the servant assumes the risk of unsafe or defective ap-

in failing to discover and remedy defects in a brake which were discoverable upon a reasonable inspection. The inspector represents the company, and is not a fellow-servant of the brakeman. *Long v. Pacific R. Co.*, 65 Mo. 225. But in some cases it is held that a notice of the defect to the car-inspector and master-mechanic would only tend to show negligence of duty on their part, and being fellow-servants of the plaintiff, no cause of action could be based on such negligence. *Kidwell v. Houston, &c. R. Co.*, 3 Woods (U. S.), 313; *Smith v. Potter*, 46 Mich. 258. *Engines and other machinery used in operating a railway are liable to become defective and dangerous, and every corporation employing such agencies is charged with notice of this fact, and is bound to exercise a degree of watchfulness commensurate with the nature of its business, and the consequences incident to neglect.* Frequent examinations or other measures of precaution are necessary to prevent engines and machinery from becoming defective and dangerous from natural causes; and consequently as to such agencies the company is bound to active diligence. *Atchison, &c. R. Co. v. Holt*, 29 Kan. 149; *Flannagan v. Chicago, &c. R. Co.*, 50 Wis. 462; *Smith v. St. Louis, &c. R. Co.*, 69 Mo. 32. The rule is that *an employé who knows, or by the exercise of ordinary diligence could know*, of any defects or imperfections in the cars or machinery about which he is employed, and continues in the service without objection, is presumed to have assumed all the consequences from such defects, and to have waived all right to recover for injuries caused thereby. *Muldowney v. Ill. Central R. Co.*, 39 Iowa, 615; *Way v. Ill. Central R. Co.*, 40 Iowa, 341; *Houston, &c. R. Co. v. Meyers*, 55 Tex. 110; *Baker v. Western, &c. R. Co.*, 68 Ga. 699; *Johnson v. Western, &c. R. Co.*, 55 Ga. 133; *Le Clair v. St. Paul, &c. R. Co.*, 20 Minn. 1; *Porter v. Hannibal, &c. R. Co.*, 71 Mo. 66; *Chicago, &c. R. Co. v. Munroe*, 85 Ill. 25; *Ill. Central R. Co. v. Jones*, 11 Ill. App. 324. In such cases the real question is whether the servant has had opportunities with his

employer for observing the defective machinery or materials, and intends to waive any objection to them. *Dale v. St. Louis, &c. R. Co.*, 63 Mo. 455. He is not under the same obligation as the employer to resort to means to discover defects, and has a right to presume that his employer has done his duty and complied with the law; therefore it is only when he has knowledge of defects in machinery, which he continues to use without objection, that he is presumed to have waived the defects. It is his *knowledge*, and not his *means of knowledge*, that affects his right to recover. *Muldowney v. Ill. Central R. Co.*, 36 Iowa, 462; *Porter v. Hannibal, &c. R. Co.*, 60 Mo. 160; *Ballou v. Chicago, &c. R. Co.*, 54 Wis. 257; 41 Am. Rep. 31. If he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases. *Crutchfield v. Richmond, &c. R. Co.*, 78 N. C. 300. And the fact that an employé knows, or could know, by ordinary care, of defects in the appliances *about which he works*, which render his employment more than ordinarily hazardous, and still remains in the employment until he is injured, tends to show contributory negligence, but is not conclusive of such negligence. *Perigo v. Chicago, &c. R. Co.*, 55 Iowa, 326. He waives all right to recover for injuries caused thereby; and this waiver cannot be affected by the particular situation in which he may be placed, or the rapidity and promptness with which he is required to act at the time of the injury. *Perigo v. Chicago, &c. R. Co.*, 52 Iowa, 276. But the fact that the machinery which caused the injury was open to the plaintiff's inspection, and was so worn as to be more than ordinarily dangerous, will not necessarily defeat a recovery where it was a matter of skill and judgment to know how much wear it would stand. *Bridges v. St. Louis, &c. R. Co.*, 6 Mo. App. 389. In the absence of proof that the plaintiff was in charge of the car at the time of the injury, except so far as is implied in his service as brakeman, or had any duty of inspecting it, there was no

pliances or machinery of which he had no knowledge, and which it was the duty of the master to remedy. In order to exempt the master from liability in such a case, he must affirmatively show that the servant had continued in his service without complaint after full knowledge of the defects.¹ Or he may show that such defects were latent, and that he was not negligent in failing to discover and remedy them.²

error in refusing to charge that it was his duty to observe any defect in it. *Wedge-wood v. Chicago, &c. R. Co.*, 44 Wis. 44; *Philadelphia, &c. R. Co. v. Schertle*, 97 Penn. St. 450; *Baltimore, &c. R. Co. v. State*, 41 Md. 268. A brakeman injured by coupling a damaged car cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read. But a charge of the court assuming as matter of law that the placing of a car on a side-track, or marking on it "out of order," was sufficient to charge an ordinary man engaged in coupling it with notice of its damaged condition and the consequent extra risk of coupling it, is erroneous. *Watson v. Houston, &c. R. Co.*, 58 Tex. 434. It is for the jury to say whether the insufficiency of employés, the dangerous character of the frog and brake-beam, being known to the injured party, were defects so glaringly dangerous that a man of prudence would not have undertaken the work, or whether he might reasonably suppose himself able to do the work safely by the exercise of great care and caution. *Stoddard v. St. Louis, &c. R. Co.*, 65 Mo. 514. If a person of ordinary prudence would not have believed the defects dangerous, he may disregard them. *Colorado, &c. R. Co. v. Ogden*, 3 Col. 499. It is error to charge that a railroad company is bound to protect its servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result. *Missouri Pacific R. Co. v. Lyde*, 57 Tex. 505. It is not negligence in the employer if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or for an external apparent one, produced by time

and use, not brought to the master's knowledge. A different rule, however, prevails where the tool or machinery is perishable. *The master is bound to know that such tool or machinery will only last a limited time, and it is his duty to renew instruments of this character at proper intervals.* *Baker v. Allegheny Valley R. Co.*, 95 Penn. St. 211; *Painton v. Northern Central R. Co.*, 83 N. Y. 7. It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose. *Porter v. Hannibal, &c. R. Co.*, 71 Mo. 66; *Smith v. Chicago, &c. R. Co.*, 42 Wis. 520.

¹ *Clapp v. Minneapolis, &c. R. Co.*, 36 Minn. 6; *Hullehan v. Greenbay, &c. R. Co.*, 68 Wis. 520; 31 Am. & Eng. R. Cas. 322; *Wells v. Burlington, &c. R. Co.*, 56 Iowa, 520; *Pennsylvania Co. v. McCormack*, 131 Ind. 250 (brakeman allowed to recover where injury resulted from a defective track). See *post*, § 371. The fact that servant had worked habitually with the machinery in question for ten or fifteen months is competent evidence from which a jury may infer that he was acquainted with its dangerous character, but it is not conclusive. *McDade v. Washington, &c. R. Co.*, 5 Mackey (D. C.), 144; 26 Am. & Eng. R. Cas. 325.

² *Sweat v. Boston, &c. R. Co.*, 156 Mass. 284; *Ballou v. Chicago, &c. R. Co.*, 54 Wis. 257; 41 Am. Rep. 31; *Smith v. Chicago, &c. R. Co.*, 42 Wis. 520; *Indianapolis, &c. R. Co. v. Toy*, 91 Ill. 474; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496; *Johnson v. Chesapeake, &c. R. Co.*, 36 W. Va. 73; *Warner v. Erie, &c. R. Co.*, 39 N. Y. 468. But in accordance with the general rule, stated in a previous section, the burden rests upon the servant

The rule as to the introduction of opinion evidence as to the dangers incident to any particular branch of service, is that "where the question under investigation so far partakes of the nature of a science as to require a course of study, or a previous habit of special practice, in order to the attainment of a correct knowledge of the subject, the opinion of witnesses competent to speak should be received."¹ In the first case cited below, the plaintiff, an employé, was injured while attempting to couple cars constructed with double "deadwoods," which, it appeared, was much more hazardous than where the cars were constructed with single "deadwoods." The plaintiff was allowed to prove by witnesses, who testified as experts, the relative manner of coupling cars equipped with single and double deadwoods, and also that the coupling of cars equipped with the latter is attended with much more danger than where the cars are equipped with single deadwoods. The witnesses were in every instance first required to describe minutely the difference in the construction and process of coupling cars equipped with single or double deadwoods. The court held that such evidence came within the rule above stated, and was properly admitted.²

SEC. 371. Remaining in Service after Knowledge of Defects, not Necessarily Negligence. — Where a servant after he has had abundant opportunity to observe all the dangers incident to his employment, including those arising from defects in the appliances or in the management of the business, and remains silent without making complaint or suggesting how the risks can be lessened, he must be taken as assuming all such risks.³ "We are firmly committed," observes the Illinois court, "to the principle that if a person knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise by the master to do

to show that the defect was one which the master was negligent in not remedying. *Pittsburgh, &c. R. Co. v. Adams*, 105 Ind. 153.

¹ *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 27; 28 Am. & Eng. R. Cas. 308; *Carthage, &c. Co. v. Andrews*, 102 Ind. 138; 52 Am. Rep. 653.

² *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 27. "The construction of cars, the mode and manner of operating them, and the effect of a particular thing on their safety and usefulness, is a habit, study, or science. . . . The ordinary juror would

not know the effect of double deadwoods." *Baldwin v. Chicago, &c. R. Co.*, 50 Iowa, 680.

³ *Dynen v. Leach*, 40 Eng. L. & Eq. 491; *Norfolk, &c. R. Co. v. Jackson*, 85 Va. 492; *Tuttle v. Detroit, &c. R. Co.*, 122 U. S. 189; 31 Am. & Eng. R. Cas. 216; *Rosenbaum v. St. Paul, &c. R. Co.*, 34 Am. & Eng. R. Cas. 274; *Appel v. Buffalo, &c. R. Co.*, 111 N. Y. 550; *New York, &c. R. Co. v. Lyons*, 119 Penn. St. 324; *Davis v. Detroit, &c. R. Co.*, 20 Mich. 105.

any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the master's wilful act."¹

But where the real danger from the use of defective machinery is not apparent, and the master with full knowledge of its defects continues to require the servant to use it, the servant, although he may be aware of such defects, is not necessarily chargeable with negligence in consenting to remain in the service and to use the machinery, if it appears that he exercised proper care in the use of it, and had reason to believe that when used with such care it was not dangerous.² The test is whether the defects were such that, as a prudent man, he was bound not to accept the risks incident thereto.³ Thus,

¹ *Stafford v. Chicago, &c. R. Co.*, 114 Ill. 244.

² In the case of *Sioux City, &c. R. Co. v. Finlayson*, 16 Neb. 584, 18 Am. & Eng. R. Cas. 68, the action was by an engineer who had sustained injuries in consequence of the explosion of the boiler of his engine. It appeared that after he had used the engine for some time he noticed evidences of weakness, and called the attention of the proper officers to it, but no repairs were made, and on several subsequent occasions he repeated his complaint. Afterwards he was requested to continue to use the engine, a promise being made that he should have a new one within a given time. He was careful to keep the steam always at low pressure, and thought that by this means any accident could be avoided. In spite of his precautions the boiler exploded, causing severe injuries. The court, in sustaining the verdict in his favor, went on to say: "Under these circumstances, it seems to us that the true rule might be stated to be that if the defective machinery, though dangerous, is not of such a character that it may not be reasonably used by the exercise of care, skill, and diligence, the servant does not assume the risk. If the servant, in obedience to the requirement of his master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for the resulting accident, . . . and especially would this be true

when it is shown that the master was fully informed of the apparent danger, and the machinery used upon his request and judgment." See *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441; *Colorado, &c. R. Co. v. Ogden*, 3 Col. 499; *Patterson v. Pittsburgh, &c. R. Co.*, 76 Penn. St. 389.

Notice of defects to a vice-principal having charge of that general department of the service is notice to the master. *Speed v. Atlantic, &c. R. Co.*, 71 Mo. 303; 2 Am. & Eng. R. Cas. 77; *Baltimore, &c. R. Co. v. McKenzie*, 81 Va. 71; 24 Am. & Eng. R. Cas. 395; *Ohio, &c. R. Co. v. Collarn*, 73 Ind. 261; 5 Am. & Eng. R. Cas. 564; *Wooden v. Humeston, &c. R. Co.*, 76 Iowa, 310; *Baldwin v. St. Louis, &c. R. Co.*, 75 Iowa, 297. But notice to a foreman or other employé who has no authority to have repairs made, is not sufficient to discharge the servant's duty to report defects. *Covey v. Hannibal, &c. R. Co.*, 86 Mo. 635; 28 Am. & Eng. R. Cas. 382; *St. Louis, &c. R. Co. v. Harper*, 44 Ark. 524; *Patterson v. Pittsburgh, &c. R. Co.*, 76 Penn. St. 390.

³ This question, and also that as to whether the danger was apparent, is for the jury. *Clark v. Holmes*, 7 H. & N. 348; *Patterson v. Pittsburgh, &c. R. Co.*, 76 Penn. St. 389; *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441. In this last case the plaintiff, a brakeman, had been injured while coupling moving cars, the proximate cause of the injury being a defect in the road-bed. The court held that it was error for the trial court to

in a Massachusetts case,¹ the plaintiff was employed as a watchman in their machine-shop. A portion of the floor over which he had to pass in the discharge of his duties had for a long time been in a state of decay, and had become unsafe. The plaintiff knew that portions of the floor were decayed, and that there were several holes in it, but the actual condition of the floor, in that respect, was not known to him, nor did it appear that he could have ascertained that the place he broke through was dangerous, unless he examined portions of the floor not open to inspection. The defendants knew, or might have known by reasonable care, the dangerous condition of the floor. The plaintiff, in consequence of the defective condition of the floor, while in the course of his employment broke through the floor and was injured. It was held that the question as to whether the plaintiff was negligent in remaining in the defendant's employ, with the knowledge he had of the condition of the floor, was a proper question for the jury, and was not a question of law for the court.

SEC. 372. Servant must exercise his Judgment: Must Report Defects. — When a servant is employed upon work, which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of negligence on the part of the servant. *A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety.* He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant.² It is negligence on his part to fail to report to the

hold as a matter of law that plaintiff was negligent in continuing in the service after full knowledge of the defect; that for the master to allow such a defect to exist was a clear breach of his duty; and it was for the jury to say whether, under all the circumstances, the plaintiff had been guilty of negligence. The opinion in this case is a very full and clear statement of the law in this connection.

¹ Huddleston v. Lowell Machine Shop, 106 Mass. 282.

² McEwing v. Waterford, &c. Ry. Co., 8 Ir. C. L. 389; Chicago, &c. R. Co. v.

Bragonier, 119 Ill. 51; Shields v. N. Y. Central R. Co. 133 N. Y. 537. An employé may rely on the promise of his vice-principal to protect him while at work on a side-track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work. Moore v. Wabash, &c. R. Co., 85 Mo. 588; 21 Am. & Eng. R. Cas. 509; Missouri Pac. R. Co. v. Watts, 68 Tex. 549; 22 Am. & Eng. R. Cas. 277. See also Burlington, &c. R. Co. v. Crockett, 19 Neb. 138; 24 Am. & Eng. R. Cas. 390.

master the necessity for repairs when it exists, unless it appears that knowledge of such necessity had already been brought home to the master.¹

It is a well recognized rule of law that a servant who has charge of or uses implements or appliances in the discharge of the duties of his employment, is required not only to use such care as to their condition as will save himself from personal injury, but his duty to his employer and to himself requires that he exercise proper care and diligence to preserve such appliances in a condition which will render them safe and fit for the purposes for which they are designed; and if repairs are required, he must make them himself or report the necessity of them to his employer or to such of his agents as are charged with the duty of attending to such matters.² Where a rule or usage of the service requires a conductor to examine the cars composing his train, his failure to do so is negligence on his part, and will prevent recovery for an injury which a proper examination might have prevented.³ The same is true as to a brakeman's duty to examine a brake, or coupling arrangement, or other appliance which he is about to use, where opportunity for examination has been afforded.⁴ But as a matter of course he could not be held

¹ *Cowles v. Richmond, &c. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620; *Johnson v. Richmond, &c. R. Co.*, 81 N. C. 453; *State v. Hannibal, &c. R. Co.*, 82 Mo. 430; *Patterson v. Pittsburgh, &c. R. Co.*, 76 Penn. St. 389; *Le Clair v. St. Paul, &c. R. Co.*, 20 Minn. 9; *Skippp v. Eastern Counties Ry. Co.*, 9 Exch. 223. The servant is not relieved from this duty to report defects by the fact that the company employs local inspectors, whose duty it is to inspect and to report defects; the servant's duty remains as imperative as if he were the sole inspector. *Chicago, &c. R. Co. v. Bragonier*, 119 Ill. 51.

² *Stroble v. Chicago, &c. R. Co.*, 70 Iowa, 555; 28 Am. & Eng. R. Cas. 510; *Ill. Central R. Co. v. Jewell*, 46 Ill. 99; *Baker v. Allegheny Valley R. Co.*, 95 Penn. St. 211; 40 Am. Rep. 634; 8 Am. & Eng. R. Cas. 142; *Ballou v. Chicago, &c. R. Co.*, 54 Wis. 257; *Chicago, &c. R. Co. v. Bragonier*, 119 Ill. 51. Therefore, where the servant is injured by the falling of a defective stairway of which he had charge, and for the condition of which he was responsible, he has no cause of action.

Stroble v. Chicago, &c. R. Co., 70 Iowa, 555. But the rule is otherwise where the master neglects to make the needed repairs after repeated complaints have been made by the servant. *Sioux City, &c. R. Co. v. Finlayson*, 16 Neb. 584; 18 Am. & Eng. R. Cas. 68.

³ *Alexander v. Louisville, &c. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

If it appears from the circumstances in evidence that the conductor had not had time or opportunity to make the examination, his failure to do so cannot be attributed to him as negligence. Whether such sufficient time or opportunity had been afforded is a question of fact for the jury. *International, &c. R. Co. v. Kindred*, 57 Tex. 491; 11 Am. & Eng. R. Cas. 649.

⁴ *Alexander v. Louisville, &c. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

See *Georgia R. & B. Co. v. Kenney*, 58 Ga. 485. In *La Croy v. New York, &c. R. Co.*, 132 N. Y. 570, the plaintiff was employed as a brakeman upon one of the defendant's freight trains; one of its printed rules required brakemen, before starting,

responsible for failing to discover a defect which would be apparent, if at all, only to an expert machinist; he is only bound to exercise the care of an ordinary man of his station.¹ Employés are not released from their duty to make such inspections by the fact that there is a regular inspector whose duty it is to inspect all cars and their appliances, and report defects to the superintendent having charge of repairs.²

SEC. 373. What Care Company must exercise. — The company is bound to use reasonable care to prevent accidents to its employés, and to this end, is bound to furnish suitable machinery and appliances, and use a like reasonable care in keeping them in proper repair; as the risks assumed by the employés do not extend to those which are brought about by the negligence of the company.³ The

to test the hand-brakes, "and see that they are in proper condition and work easily." This was not done by plaintiff, or any of the brakemen upon the train in question. The train stopped for about two hours at a station where the cars were usually inspected, but no inspection was made. It stopped at another station, just beyond which was a steep down-grade, but although the plaintiff and his associates knew of this grade, and of the dangers incident to an attempt to take such a train down without the brakes being in good order, and also, that the brakes of heavily loaded moving cars were apt to get out of order, made no examination. Upon their attempting to set the brakes, after the train started on the down-grade, a number of them would not work, — in consequence the speed of the train could not be checked, and the greater portion of it was thrown from the track, thereby injuring the plaintiff. In an action to recover damages, it appeared that the plaintiff knew of and had read the printed rules. It was held that as an obedience of the rules would have prevented the accident, the plaintiff was not entitled to recover. And even if the plaintiff had been unacquainted with the rules he would not be entitled to recover, since, with full knowledge of the dangers, it was incumbent upon him and his associates to ascertain before reaching the down-grade that a sufficient number of the brakes properly to check the train were in order.

¹ Central R. Co. v. Haslett, 74 Ga. 85.

² Chicago, &c. R. Co. v. Bragonier, 119 Ill. 51.

³ Lake Shore, &c. R. Co. v. Fitzpatrick, 31 Ohio St. 474; Muldowney v. Ill. Central R. Co., 36 Iowa, 462; Fifield v. Northern R. Co., 42 N. H. 225. In Ellis v. New York, &c. R. Co., 95 N. Y. 546, an action was brought to recover for the death of the plaintiff's intestate, a brakeman employed by the defendant, who, seeing the imminence of a collision between the freight train on which he was employed, and one approaching it from the rear, went out of the front door of the caboose attached to the end of his train and attempted to escape, but was caught between the caboose and the next car and received fatal injuries. It was claimed that the result was due to the fact that the "buffer" on the caboose was so much lower than that of the preceding car that the caboose was driven under the bumper-block of the car ahead, and thus the theory of the action was that the cars and appliances furnished the deceased by the defendant were unsafe and unsuitable, and that this act constituted negligence that would authorize recovery. It was held that it was the duty of the defendant to provide a car properly fitted, not only with running apparatus; — as wheels, stopping-apparatus, as a brake, — but with buffers of some kind, to protect the car and its servants, necessarily or lawfully thereon, from the effect of a collision. Canfield v. Baltimore, &c. R. Co., 93 N. Y. 532; 45 Am. Rep. 268; Dana v. N. Y. Central R.

same rule applies whether the appliances of the road were manufactured by the company or purchased from a manufacturer.¹ Where cars come into its trains from other roads, the better doctrine seems to be that the company has a right to assume that they are in proper repair and condition: but, as will be seen by the cases cited below, the doctrine is by no means uniform or settled.² "While

Co., 92 N. Y. 639; *Sheehan v. N. Y. Central R. Co.*, 91 N. Y. 332; *Durkin v. Sharp*, 88 N. Y. 225; *Booth v. Boston, &c. R. Co.*, 73 id. 38; 29 Am. Rep. 97; *Plank v. N. Y. Central R. Co.*, 60 N. Y. 607; *Flike v. Boston, &c. R. Co.*, 53 N. Y. 550; 13 Am. Rep. 545.

¹ *Toledo, &c. R. Co. v. Ingraham*, 77 Ill. 309; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Chicago, &c. R. Co. v. Jackson*, 55 Ill. 492; *Hough v. Texas, &c. R. Co.*, 100 U. S. 213; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420.

² *Bailou v. Chicago, &c. R. Co.*, 54 Wis. 250. One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. See *Wedgewood v. Chicago, &c. R. Co.*, 41 Wis. 478; *Smith v. Chicago, &c. R. Co.*, 42 id. 520; *Morrison v. Phillips, &c. Constr. Co.*, 44 Wis. 405; *Steffen v. Chicago, &c. R. Co.*, 46 id. 265; *East St. Louis, &c. R. Co. v. Hightower*, 92 Ill. 139; *Indianapolis, &c. R. Co. v. Toy*, 91 id. 474; *De Graff v. Railroad Co.*, 76 N. Y. 125; *Warner v. Indianapolis, &c. R. Co.*, 39 id. 468; *Baldwin v. Railroad Co.*, 50 Iowa, 680; *Davis v. Railroad Co.*, 20 Mich. 105; *Fort Wayne, &c. R. Co. v. Gildersleeve*, 33 Mich. 133; *Mad River R. Co. v. Barber*, 5 Ohio St. 541. But in *O'Neil v. St. Louis, &c. R. Co.*, 9 Fed. Rep. 337, a contrary doctrine was held, and where an accident occurred to an employé in consequence of the introduction of a foreign and defectively constructed car into the train on which he was employed, it was held that he might maintain an action of damages against the company therefor. *Michigan Central R. Co. v. Smithson*, 45 Mich. 212. In a New York case, on a dark night, when snow

was on the ground, the plaintiff, a brakeman, was sent to couple together two cars in a freight train which had broken apart. The defendant had three rails laid to enable it to run broad and narrow gauge cars in the same train. Freight-cars usually have upon their ends pieces of wood, called bumpers, extending six or eight inches beyond the car, so that if the draw-heads pass each other the shock is received by the buffers, and a brakeman, if he be between the cars, will be uninjured. One of the cars which the plaintiff was to couple was a broad-gauge and the other a narrow-gauge car. The buffers only extended three inches beyond the car. These cars did not belong to the defendant. The draw-heads passed each other and the plaintiff was injured. It was held that the question of the defendant's negligence in failing to have proper bumpers upon the cars used by it was properly submitted to the jury, and that a verdict in favor of the plaintiff would not be disturbed. *Gottlieb v. New York, &c. R. Co.*, 29 Hun (N. Y.), 637. In a Minnesota case, the defendant received into its service from another railway company a freight-car which proved to be in bad order, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car, was severely injured in consequence of its defective condition, which was not known to him, but was discoverable on proper inspection. It was held, that, as respects such defects, the company was answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. *Fay v. Minneapolis, &c. R. Co.*, 30 Min. 231; *St. Louis, &c. R. Co. v. Valirius*, 56 Ind. 511. The rule may be said to be that if a railway company permits a defective and

it is true that on the one hand, a servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged, it is also true on the other hand that the employer or master impliedly con-

dangerous car to come into its yards or upon its tracks, and remain for so many days that it might, by the exercise of proper diligence, discover its condition, and if, from the want of such diligence, an injury happen to an employé, who was exercising due care, the company will be liable, although it does not own the car. *Chicago, &c. R. Co. v. Bragonier*, 11 Ill. App. 516. But a railway company receiving a loaded car from another road, and running it upon its own line, *is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact.* *Ballou v. Chicago, &c. R. Co.*, 54 Wis. 257. Nor can it be said to be negligent for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. *Baldwin v. Chicago, &c. R. Co.*, 50 Iowa, 680. A statutory requirement that every railway shall impartially and diligently receive and forward the cars of other lines does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable despatch. *Smith v. Potter*, 46 Mich. 258. A section-master in temporary charge of a hand-car must note such defects in it as are discernible in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it, if it be obviously unsafe; otherwise he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. If the defect in the car was such as to deceive human judgment, the company, as well as

the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer as well as to his own credit. *Georgia R. & B. Co. v. Kenney*, 58 Ga. 485; *Kenney v. Central R. & B. Co.*, 61 Ga. 590; *Central R. Co. v. Kenney*, 64 Ga. 100; *East Tenn., &c. R. Co. v. Smith*, 9 Lea (Tenn.), 685. Where an employé was injured by a defect in a hand-car, and the defect was apparent, the employé is presumed to have assumed the risk. But if the danger was greater than could be discovered by the use of ordinary care, then the employer was in default when the injury was produced in a manner not anticipated. *International, &c. R. Co. v. Doyle*, 49 Tex. 190; *Barringer v. Delaware, &c. Canal Co.*, 19 Hun (N. Y.), 216. It is gross negligence for a railway company to run its trains on a dark night without a headlight. *Burling v. Ill. Central R. Co.*, 85 Ill. 18. In an action by one injured by the giving way of a hoisting apparatus, used in connection with a train of the company, it appeared that the plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. It was held that the conductor was a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company, and render it responsible. But if he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise. *McGowan v. St. Louis, &c. R. Co.*, 61 Mo. 528.

tracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged with a reasonable degree of safety to life and security against injury."¹

The company's duty extends not only to its machinery and appliances, its cars and their equipments, but to the entire property involved in the operation of the road. Thus, where an injury results to its servants from a defect in its tracks or bridges, the same rule applies as where it results from the defective equipment of the cars, and it would be no defence to the company that the track belonged to another company.²

But while the rule is universally recognized that in carrying its employes over its road to and from their work, the company must provide a track suitable and sufficient to carry them safely, and to keep it in good order; this duty must be considered with some qualification when the road has become dilapidated and out of order, and is in process of reconstruction or repair, in which work the employé is engaged. In such cases the unusual danger is perfectly apparent,

¹ BIGELOW, J., in *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 445. See also *Seaver v. Boston, &c. R. Co.*, 14 Gray (Mass.), 466.

² *Wisconsin Cent. R. Co. v. Ross* (Ill.), 31 N. E. Rep. 412; *Wabash, &c. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1; *Ill. Central R. Co. v. Frelka*, 110 Ill. 498; 18 Am. & Eng. R. Cas. 7; *Pennsylvania Co. v. McCormack*, 131 Ind. 250; *Bowen v. Chicago, &c. R. Co.*, 95 Mo. 268; *Rosenbaum v. St. Paul, &c. R. Co.*, 38 Minn. 173. See also *Kain v. Smith*, 80 N. Y. 458.

Compare Trask v. Old Colony R. Co., 156 Mass. 298, holding that no liability attaches to the company for an injury resulting from a defect in the track of another company, which the former was using temporarily for the purpose of transferring cars to its own road.

It is negligence for the company so to construct a side-track that when cars are standing thereon trains cannot pass on the main line without endangering the lives

of brakemen engaged in the discharge of their duties; and the fact that the car was left on the side-track through the negligence of a fellow-servant of the injured employé would be no defence to an action against the company. *Pennsylvania Co. v. McCormack*, 131 Ind. 250. So where the company allowed the snow shovelled from the track to be piled up near it, so that a brakeman, in stepping from between cars which he had been coupling, slipped on it and fell under the moving cars, it was held that the injury resulted from the negligent operation of the road, and that the company was therefore liable. *Cregg v. Chicago, &c. R. Co.*, 91 Mich. 624. So also the company is liable where it allows posts or buildings to be erected so near to the track that a brakeman in the discharge of his duty on a moving train is struck by them and injured without negligence on his part. *Kelleher v. Milwaukee, &c. R. Co.*, 80 Wis. 584; *Nance v. Newport News, &c. R. Co.* (Ky.), 17 S. W. Rep. 570.

and the servant must be considered as assuming the increased risks.¹ Similarly, when a defective car is being carried to the repair-shop, servants employed in moving the car to the shop, since they have full knowledge of the defect, must be considered as assuming the extra hazard.²

A railway company is not held to the exercise of extraordinary care, as in the case of passengers, but is only required to furnish such appliances as are reasonably calculated to insure the safety of its employé.³ The servant has a right to assume that the machinery and implements furnished are suitable for the business, and except as to patent and obvious defects he has a right to rely upon it that the company has discharged its duty, and is not himself required to inspect them to ascertain whether they are in fact suitable.⁴ If the master ought to have known that the instrumentalities of the business were defective or unsafe,—that is, if by the exercise of ordinary care he could have known it,—he is liable for all injuries resulting from such defects; his negligence in failing to discover defects is equally culpable with a failure to remedy them after they have become known to him.⁵

The company is not responsible for an injury resulting from defective appliances, unless it has been guilty of negligence in ascertaining the defect. Thus, if the coupling of a freight-car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employé, received in consequence thereof, *unless its attention had been called to the defect, or, by the exercise of a reasonable degree of care, it could have discovered the defect*, and had an opportunity to make the needed repairs.⁶ For there is

¹ Brick v. Rochester, &c. R. Co., 98 N. Y. 211; 21 Am. & Eng. R. Cas. 605; Philadelphia, &c. R. Co. v. Schertle, 97 Penn. St. 450; Carlson v. Oregon, &c. R. Co., 21 Oreg. 453; Bryant v. Burlington, &c. R. Co., 66 Iowa, 305; 55 Am. Rep. 275; 21 Am. & Eng. R. Cas. 593; Howland v. Milwaukee, &c. R. Co., 54 Wis. 226. Compare Madden v. Minneapolis, &c. R. Co., 32 Minn. 303, where recovery was allowed in such a case.

But even in such cases the company is responsible if the train is run at a rate of speed which is clearly dangerous, in view of the unsafe condition of the track. Meloy v. Chicago, &c. R. Co., 77 Iowa, 743.

² Flannagan v. Chicago, &c. R. Co., 50 Wis. 462; 2 Am. & Eng. R. Cas. 150; 45 Wis. 98.

³ Cooper v. Central R. Co., 44 Iowa, 134.

⁴ Porter v. Hannibal, &c. R. Co., 71 Mo. 66; Evans v. Lake Shore, &c. R. Co., 12 Hun (N. Y.), 289; King v. Ohio, &c. R. Co., 14 Fed. Rep. 277.

⁵ Williams v. Clough, 3 H. & N. 258; Stone v. Manufacturing Co., 4 Oreg. 52; Mich. Central R. Co. v. Dolan, 33 Mich. 510; Owen v. N. Y. Central R. Co., 1 Lans. (N. Y.) 108; Stark v. Patterson, 5 Phila. (Penn.) 225.

⁶ Indianapolis, &c. R. Co. v. Flanigan, 77 Ill. 365. "The cases in this State and

no implied warranty on the part of the company as to the sufficiency or soundness of the machinery or implements furnished; it unques-

in sister States are with great unanimity to the effect that if injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence or want of care, or, in other words, it must be shown he either knew or ought to have known the defects which caused the injury." *Scott, J.*, in *Columbus, &c. R. Co. v. Troesch*, 68 Ill. 552. In *Steffen v. Railway Co.*, 46 Wis. 265, the court said: "There may be latent risks in an employment. Where these are known to the master, it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In *East St. Louis, &c. Co. v. Hightower*, 92 Ill. 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge, or might have had knowledge, of the defect by the use of reasonable diligence." *Indianapolis, &c. R. Co. v. Toy*, 91 Ill. 474. In *De Graff v. N. Y. Central R. Co.*, 76 N. Y. 125, a brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake-chains to see if they were in their place and apparently sound, but did not test their strength." The court, from all the evidence, held that the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that the defect could have been discovered by the exercise of ordinary care, or that such care was not used; and that therefore a refusal to non-suit was error. In *Warner v. Erie R. Co.*, 39 N. Y. 468, the plaintiff was injured by reason of the fall of a defective

railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the railway company was not liable. And it may be said that the authorities establish the rule that where the injury is the result of a latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care, the master will not be held liable. In *Baldwin v. Chicago, &c. R. Co.*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment." In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Detroit, &c. R. Co.*, 20 Mich. 105. A railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. Wayne, &c. R. Co. v. Gildersleeve*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon interstate commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employé, and the result of the neglect of that ordinary and reasonable care and diligence, in furnishing sufficient and safe cars and machinery for the train, which

tionably is bound to the exercise of a high degree of diligence in this regard, but to nothing more.¹

SEC. 374. Duty of Company to inspect Appliances.—It is the duty of a railway company to inspect and test its appliances at reasonable periods, and it is bound to know that they will by constant use become defective;² the duty to provide safe and proper appliances is not greater than that to maintain them in such condition;³ but where any of the appliances of the business are apparently safe, and the servants using them make no complaint, and do not call their attention to any defects therein, it cannot be held responsible for an injury resulting from a defect suddenly appearing, unless it has been remiss in testing the appliance; which can only be said to be the case when its attention has been called thereto, or when it has been in use so long, and under such circumstances, that it is bound to know that it must in the ordinary course of things have become unsafe.⁴ Thus, in a Pennsylvania case,⁵ the plaintiff's intestate was

appertains to that particular branch of business. *Mad River, &c. R. Co. v. Barber*, 5 Ohio St. 541. In *Smith v. Chicago, &c. R. Co.*, 42 Wis. 520, the brake-staff or rod on a wood train broke just below the cog-wheel near the top of the car, on account of an old crack or seam therein, in consequence of which the brakeman was thrown from the car and injured. The plaintiff had a verdict, but the Supreme Court set it aside upon the ground that there was no evidence to show that the company had been guilty of any negligence in not applying a proper and sufficient test to the brake-rod. And the same rule was applied in *Morrison v. Construction Co.*, 44 Wis. 405, where an injury resulted from the breaking of the wheel of a car.

¹ *Columbus, &c. R. Co. v. Troesch*, 68 Ill. 552; *Noyes v. Smith*, 28 Vt. 59; *Carlson v. Oregon, &c. R. Co.*, 21 Oreg. 454; *Bowen v. Chicago, &c. R. Co.*, 95 Mo. 268.

² *Atchison, &c. R. Co. v. Holt*, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206; *Durkin v. Sharp*, 88 N. Y. 225; *Brann v. Chicago, &c. R. Co.* 53 Iowa, 595; 36 Am. Rep. 243; *Pennsylvania, &c. R. Co. v. Mason*, 109 Penn. St. 296.

³ *Tierney v. Minneapolis, &c. R. Co.*, 33 Minn. 311; 21 Am. & Eng. R. Cas. 545.

The court observed: "This duty [to keep in repair] necessarily involves inspection and examination as incident to the obligation to repair, and as a corporation must necessarily act through its agents, the negligence of its employes in the discharge of such duty is attributable to the corporation." *Solomon R. Co. v. Jones*, 30 Kan. 601; *Atchison, &c. R. Co. v. Holt*, 29 Kan. 149; *Porter v. Hannibal, &c. R. Co.*, 71 Mo. 66, 77; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567; *Brann v. Chicago, &c. R. Co.*, 53 Iowa, 595, 36 Am. Rep. 243; *Dana v. New York, &c. R. Co.*, 92 N. Y. 639; *Richardson v. Gt. Eastern Ry. Co.*, 1 C. P. Div. 342. See also, as to the principle of the text, *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Michigan, &c. R. Co. v. Smithson*, 45 Mich. 210; 1 Am. & Eng. R. Cas. 101; *King v. Ohio, &c. R. Co.* 10 Fed Rep. 277.

⁴ *Baker v. Allegheny Valley R. Co.*, 95 Penn. St. 211; 40 Am. Rep. 634; 8 Am. & Eng. R. Cas. 141; *Kitteringham v. Sioux City, &c. R. Co.*, 62 Iowa, 285; 18 Am. & Eng. R. Cas. 14; *Atchison, &c. R. Co. v. Holt*, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206.

⁵ *Baker v. Allegheny Valley R. Co.*, 95 Penn. St. 211; 40 Am. Rep. 634.

killed by the breaking of a derrick rope which he was using while in the defendant's employ. It appeared that the rope had been in use for three years. The court held that an employer should know that a rope used for three years is no longer safe, and that he is responsible for an injury caused, by the breaking of such a rope, to an employé who did not know the facts. SHARSWOOD, J., said: "The duty which the master owes to his servants is to provide them with safe tools and machinery, when that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use, it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself.¹ But do these rules apply to such an instrument as a rope used in a derrick which is employed in raising heavy weights? No doubt a perfectly new rope, and one to all appearance sound, may break, and the master would not be responsible for the consequences, having furnished a rope of the proper size for the purpose, to all appearances sound. But there was evidence in this case, sufficient certainly to make a question for the jury, that such a rope, after having been used for a year or more, and exposed during that time as the one in question seems to have been, was no longer a safe rope, even though it did not outwardly exhibit any signs of decay. The master is bound to know that a rope, under such circumstances, will only last a limited time. It will not do for him to furnish a sound rope, and then fold his arms until, by actually breaking, it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that, after such a time, he ought to provide a new rope. Is the servant bound to notify the master of that which he knows or ought to know without such information? He knows how long the rope has been in use. The servant may not know. In this case the deceased did not know; it appears to have been the first day that he worked on the derrick. There was nothing to attract his notice in the outward

¹ Ryan v. Cumberland Valley R. Co., 23 Penn. St. 384.

appearance to show how long it had been in use. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it."¹

The company cannot relieve itself of this duty of inspection by intrusting it to another, for it becomes as responsible for the neglect of such representative as for its own want of care.²

A railroad company, drawing the cars of another company over its road, owes a duty to its employés in reference thereto. It is bound to inspect such cars the same as its own, and is responsible for the consequences of such defects as would have been disclosed by ordinary inspection, as it is its duty either to remedy them or to refuse to take the cars. The employé no more assumes the risks of such defects than those in cars belonging to his employer.³

SEC. 375. Degree of Care required of the Master. — The proposition may be stated broadly that in no case can the master be held chargeable for an injury resulting to his servant from defects in the

¹ See *Atchison, & Co. R. Co. v. Holt*, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206. In the case of *Vosburgh v. Lake Shore, & Co. R. Co.*, 94 N. Y. 374; 46 Am. Rep. 148; 15 Am. & Eng. R. Cas. 249, a railroad company purchased the line of another company of which an existing bridge formed a part, and this bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, which were obvious to the eye of a skilled inspector, and could have been easily ascertained by proper examination or inspection. The court held that the company was negligent in continuing the use of the bridge without an inspection, and that it was liable to an employé injured by a fall of the bridge; the fact that the bridge had proved sufficient for several years did not relieve the company from liability, it only made the necessity for inspection the more obvious.

² *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 447; 85 Am. Dec. 720.

³ *Gottlieb v. New York, & Co. R. Co.*, 100 N. Y. 462; 29 Hun (N. Y.), 637; *St. Louis, & Co. R. Co. v. Valirius*, 56 Iqd. 511. See also *Sawyer v. Minneapolis, & Co. R. Co.*, 38 Minn. 103; 33 Am. & Eng. R. Cas. 394. In the first of these cases, the plaintiff, a brakeman in defendant's employ,

was crushed between two cars while coupling them. It appeared that defendant's road was so arranged that both broad and standard gauge cars could be run upon it in the same train, and there were both kinds of cars in the train in question. The train parted in the night, and the two cars which plaintiff was required to couple were of different gauge, — failing to make the coupling the draw-heads passed each other, and the bumpers, which were intended to protect brakemen, and should be wide enough for that purpose, being but three inches wide, were entirely insufficient to protect him, and he received the injury complained of. It was held that where trains are so made up of cars of different gauge, as the draw-heads are more apt to pass each other, it is more important that the bumpers should be well looked to so that they may afford the intended protection, and the defect being an obvious one and easily remedied, the testimony authorized a finding of negligence on the part of defendant. The fact that the two cars in question did not belong to defendant but to other companies, but were received by defendant to be transported over its road, and that they were in good repair, the defect being in their original construction, could not relieve defendant from liability.

machinery or other appliances of the business, unless negligence or fault can be imputed to him.¹ The master's liability is based upon his personal negligence; hence, in all cases the evidence must establish personal fault, or what is equivalent thereto on his part.² He is bound to exercise reasonable care in the choice of the instrumentalities of his business, and the specific degree of care that he must exercise is measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed;³ and therefore the question of negligence on his part is essentially a question for the jury in each case,⁴ and is to be ascertained in view of the circumstances of the case.⁵ A person employing a servant in a powder-mill, where the slightest friction of machinery would probably result in an explosion of the works, and involve serious injury if not instant death to the servant, would be held to a much higher degree of care in the selection of machinery, and watchfulness over it, than one who was engaged in a less hazardous business, and where the consequences of neglect in those respects would be less serious. What would be due care in reference to one class of business might be gross negligence in another. The master is bound to furnish appliances or instrumentalities as safe and free from latent defects as ordinary care and prudence can provide; and this care must be commensurate with the risks to his servants incident to faulty or defective appliances,⁶ and must be continued while the machinery or

¹ *Clarke v. Holmes*, 7 H. & N. 937; *Bartonshill Coal Co. v. Reid*, 3 Macq. (Sc.) 265.

² *Scott, J., Columbus, &c. R. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Hayden v. Smithville Co.*, 29 Conn. 548.

³ *Noyes v. Smith*, 28 Vt. 39. The care required of the company is ordinary care; it is error to instruct the jury that the company should protect its servants from injury by reason of latent or unseen defects, "so far as human care can accomplish the result." *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 509; 11 Am. & Eng. R. Cas. 188; *Railway Co. v. Aiken*, 89 Tenn. 251; *Houston, &c. R. Co. v. Oram*, 49 Tex. 341; *Smoot v. Mobile, &c. R. Co.*, 67 Ala. 14. And he cannot be held to warrant the safety of the appliances furnished by him. *Louisville, &c. R. Co. v. Allen*, 78 Ala.

494; 28 Am. & Eng. R. Cas. 514; *Little Rock, &c. R. Co. v. Duffy*, 35 Ark. 602; 4 Am. & Eng. R. Cas. 637; *Columbus, &c. R. Co. v. Troesch*, 68 Ill. 545; *Painton v. Northern Central R. Co.*, 83 N. Y. 7.

⁴ *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441.

⁵ *Dixon v. Rankin*, 14 Court of Sessions Cas. (Sc.) 420.

⁵ *Dixon v. Rankin, ante*; *Tarrant v. Webb*, 18 C. B. 797; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 238; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Bartonshill Coal Co. v. Reid*, 3 Macq. (Sc.) 272; *Keegan v. Railroad Co.*, 8 N. Y. 175; *Clarke v. Holmes*, 7 H. & N. 937; 6 id. 349; *Wigmore v. Jay*, 5 Exch. 354; *Buzzell v. Laconia, &c. Co.*, 48 Me. 113; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441; *Hayden v. Smithville Co.*, 29 Conn. 548.

appliances are in use, to see that they are kept in repair and in a safe condition. "It is the duty," say the court in a Maine case,¹ "of every employer to use reasonable precaution for the safety of those in his employment, by providing them with suitable machinery, and keeping it in a condition not to endanger the safety of the employed; and by the same reasoning, bridges, passage-ways, or ladders necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer."²

SEC. 376. Master is presumed to have discharged his Duty.—The measure of the master's duty is to exercise due care in providing instrumentalities for the servant in the prosecution of the business, and *prima facie* he is presumed to have done so;³ and if he has in fact done so, no liability attaches for defects therein, either in machinery,⁴ materials,⁵ buildings,⁶ or other appliances,⁷ unless negli-

¹ Buzzell v. Laconia Mfg. Co., 48 Me. 113.

² In Fifield v. Northern R. Co., 42 N. H. 225, the defendant provided a safe road-bed, but during the winter season permitted it to become blocked with snow and ice, and did not use due care to remove it. The plaintiff having been injured in consequence of such obstruction, the company was held chargeable with negligence, and liable therefor. Knowledge of an engineer of defects in an engine is held knowledge of the master. Nashville, &c. R. Co. v. Elliott, 1 Cold. (Tenn.) 612. So knowledge of a foreman whose duty it is to repair, is knowledge of the master. Brabbitts v. Chicago, &c. R. Co., 37 Wis. 290. See also Baldwin v. Cassella, L. R. 7 Exch. 325. In Snow v. Housatonic R. Co., 8 Allen (Mass.), 440, the plaintiff was injured while uncoupling cars, by reason of defects in the road-bed. It was held that, as these defects were the result of original construction, the defendants were chargeable with negligence, and consequently with liability. Ryan v. Fowler, 24 N. Y. 410; Seaver v. Boston, &c. R. Co., 14 Gray (Mass.), 466; Keegan v. Western R. Co., 8 N. Y. 175; King v. Boston, &c. R. Co., 9 Cush. (Mass.), 112; Park v. O'Brien, 23 Conn. 339; Norris v. Litchfield, 35 N. H. 271; Wright v. N. Y. Central R. Co., 25 N. Y. 562; Brydon v. Stewart, 2 Macq. (Sc.) 30.

³ Hard v. Vermont, &c. R. Co., 32 Vt. 473. "The legal implication is," say the court in Gibson v. Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497, "that the employer will adopt suitable instruments and means with which to carry on his business; and where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew, or might have known by the exercise of reasonable care, that the apparatus was unsafe. He is not bound to furnish absolutely safe instrumentalities. If he uses due care in that respect, his duty is discharged." Riley v. Baxendale, 6 H. & N. 445. The injury must be attributable to the master's neglect. Brydon v. Stewart, 2 Macq. (Sc.) 30; Williams v. Clough, 3 H. & N. 259; Roberts v. Smith, 2 id. 213; Marshall v. Stewart, 33 Eng. Law & Eq. 1; Paterson v. Wallace, 1 Macq. 784; Ormond v. Holland, 1 Ellis, B. & E., 102.

⁴ Hard v. Vermont, &c. R. Co., 32 Vt. 473; Noyes v. Smith, 28 Vt. 59.

⁵ Tarrant v. Webb, 8 C. B. 797; Railroad Co. v. Webb, 12 Ohio St. 475; Wigmore v. Jay, 5 Exch. 354.

⁶ Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573.

⁷ Warner v. Erie R. Co., 39 N. Y. 468; Wilson v. Merry, L. R. 1 S. & D. 326.

gence can be imputed to him in reference to their examination and repair.¹ Thus, where a railroad company builds its road, lays its rails, erects its bridges, and stocks it with machinery and cars, it is presumed to have done so with due care, and is not liable to a servant for any defects therein, unless negligence can in fact be shown in reference to the particular matter producing the injury.² Therefore, if a servant is injured by defects in the instrumentalities of the business, he must show *some* fault on the part of the master, as that he did not use ordinary care in providing them originally,³ or that he did not exercise such care in keeping them in repair;⁴ and the fact that the defect might have been ascertained by proper examination and care on the master's part, is sufficient evidence of negligence to charge him with liability;⁵ and he cannot screen himself from liability upon the ground that *he did not know* of the defect, if by ordinary care he would have known of it. *He is bound to know.*⁶

SEC. 377. **Liable for Acts of Agents, when.** — It is its duty to use reasonable care in the selection of all the appliances of its business, and as this is a duty which the company owes to the servant, it can-

¹ Chicago, &c. R. Co. v. Sweet, 45 Ill. 197. See also Snow v. Housatonic R. Co., 8 Allen (Mass.), 441; Plank v. Railroad Co., 60 N. Y. 607.

² Warner v. Erie R. Co., 39 N. Y. 468; Faulkner v. Erie R. Co., 40 Barb. (N. Y.) 324; Indianapolis R. Co. v. Love, 10 Ind. 553; Moss v. Johnson, 22 Ill. 563; Seaver v. Boston, &c. R. Co., 14 Gray (Mass.), 466.

³ Williams v. Clough, 3 H. & N. 259; Patterson v. Railroad Co., 76 Penn. St. 389. When an injury results from a defect in machinery, which was constructed for the master, it is not enough to show that the machine was defectively constructed, but it must also appear that the master did not exercise due care in selecting competent persons to construct it. Potts v. Port Carlisle, &c. R. Co., 8 W. R. 524.

⁴ Johnson v. Bruner, 61 Penn. St. 58; McMahon v. Davidson, 12 Minn. 357; Columbus, &c. R. Co. v. Webb, 12 Ohio St. 475. "A railroad company," say the court, in Nashville R. Co. v. Elliott, 1 Cold. (Tenn.) 611, "is bound to see that its road is in good condition and safe, and that the engines are perfect, and properly constructed according to the pres-

ent improvements in the art; and also to have competent engineers; and if an injury is occasioned to an employé by an imperfection in the road or machinery, the company will be held responsible, provided it had knowledge of such defect, or in the exercise of ordinary care might have known it; and the knowledge of such defect by an engineer employed by the company is knowledge on the part of the company."

⁵ Dixon v. Rankin, 14 Court of Sess. (Sc.) 420; Williams v. Clough, 3 H. & N. 259; Plank v. N. Y. Central R. Co., 60 N. Y. 607; Warner v. Erie R. Co., 39 N. Y. 468.

⁶ Hayden v. Smithfield Mfg. Co., 29 Conn. 548; Hayes v. Smith, 28 Vt. 59; Ryan v. Fowler, 24 N. Y. 410; 82 Am. Dec. 315. An allegation in the petition that the injury was caused by the negligence of the master in failing to provide safe appliances, and stating particulars of the defect, is equivalent to a specific allegation that the master knew, or might have known, of the defect. Crane v. Missouri Pacific R. Co., 87 Mo. 588; 25 Am. & Eng. R. Cas. 440.

not relieve itself from responsibility by showing that it had delegated the duty to a competent agent. The duty is positive and must be fulfilled strictly,¹ the rule being that, where a master owes certain duties to his servant, he is liable for the manner in which

¹ Chicago, &c. R. R. Co. v. Taylor, 69 Ill. 461; Chicago, &c. R. R. Co. v. George, 19 Ill. 510; Illinois Central R. R. Co. v. Jewell, 46 Ill. 99; Ford v. Fitchburg R. R. Co., 110 Mass. 240; Besel v. N. Y. Central R. R. Co., 70 N. Y. 171; Huntington, &c. R. & Coal Co. v. Decker, 82 Penn. St. 119; Brickner v. N. Y. Central R. R. Co., 2 Lans. (N. Y.) 506; Laning v. N. Y. Central R. R. Co., 49 N. Y. 521; Booth v. Boston, &c. R. R. Co., 73 N. Y. 38; Harvey v. N. Y. Central R. R. Co., 19 Hun (N. Y.), 556; Flike v. Boston, &c. R. R. Co., 53 N. Y. 564; Gunter v. Graniteville Mfg. Co., 18 S. C. 262. In Mitchell v. Robinson, 80 Ind. 281, it appeared that the appellant, who resided in Kentucky, had formed a partnership for the purpose of buying and slaughtering hogs in New Albany, Indiana, on the premises where the appellee was hurt, one of the appellants being the owner of the premises. At the time of the accident, they were engaged in preparations for commencing the business. The defendants were not personally present, and had no notice of the defective condition of the boiler. They had employed one Jones as a general superintendent of their proposed business, and in that capacity he was present, superintending the said preparations, and had engaged the appellee to come and go to work as a common laborer on the day when he was injured. He came accordingly, in the morning, and was preparing to go to work, but Jones had not yet arrived, when the explosion took place. Some days before, Jones had been notified by one who had been employed to clean the boiler and had been in it for that purpose, that the boiler was unsafe; that there was a crack in the head of it more than a foot long. In support of their claim that Jones and the appellee were fellow-servants, and that the appellee could have no recourse upon the master for an injury caused by the negligence of Jones to notify the master of the defective

condition of the boiler, the following cases were cited: Columbus, &c. R. R. Co. v. Arnold, 31 Ind. 174; Wright v. N. Y. C. R. R. Co., 25 N. Y. 562; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Roberts v. Smith, 2 H. & N. 213; Wigmore v. Jay, 5 Exch. 354; Keegan v. Western R. R. Co., 8 N. Y. 175; Ormond v. Holland, Ell., B., & E. 102. The case, however, was held not to come within the principle contended for, as applicable to fellow-servants engaged in the same employment, but rather within the rule that *a general agent employed to represent the master in his absence, and charged with the duties which it would be incumbent on the master to perform if he were present, is not a mere fellow-servant, whose negligence can impose no liability upon the master to an injured subordinate.* The owner of mills or machinery, which men are employed to operate, owes duties to the employés which he cannot escape by absenting himself and committing the entire charge to an agent. Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369, where it is shown that the individual who does act by an agent, as well as a corporation which can act in no other way, is responsible for the neglect of the general agent so employed. To the same effect are Gormly v. Vulcan Iron Works, 61 Mo. 492; Shanny v. Androscoggin Mills, 66 Me. 420; Cumberland, &c. R. R. Co. v. State, 44 Md. 283; Cumberland, &c. R. R. Co. v. State, 45 id. 229; Brabbits v. Chicago, &c. R. R. Co., 38 Wis. 289. This is in harmony with the cases in which it is held that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation. Pittsburgh, &c. R. R. Co. v. Ruby, 38 Ind. 294; Ohio, &c. R. R. Co. v. Collarn, 73 id. 261; 38 Am. Rep. 134; Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573; Murphy v. Smith, 19 C. B. (N. S.) 361.

that duty is discharged, through whatever agency he acts.¹ Therefore if a railway company delegates to an employé the duty of inspecting the machinery and appliances of the road, *while engaged in the discharge of that duty he is acting not only for, but as the company; and his negligence in that respect is the negligence of the company.*² It is said in some of the text-books,³ and in some of the cases,⁴ that in all cases where the master has committed the entire control or management of his business to another, reserving no discretion or control to himself, the person to whom such power is delegated stands in the place and stead of the master, so that his acts are, in law, the acts of the master.⁵ But this rule is difficult of application, and by no means embodies the doctrine advanced by the cases. The instances are rare in which the master, either by himself or some superior servant, does not reserve *some* supervision over every department of his business, or at least reserve such a right in himself; and if the rule was to be confined to such narrow limits as a strict application of the letter and spirit of the rule as stated indicates, very few cases would come within its operation; and the rule as now held by the better class of cases may be said to be that *whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent; and to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other*

¹ *Wager v. Railroad Co.*, 55 Penn. St. 473; *Hurd v. Rutland, &c. R. R. Co.*, 32 Vt. 473; *Ford v. Fitchburg R. R. Co.*, ante; *Beaulieu v. Portland, &c. R. R. Co.*, 48 Me. 295; *O'Conner v. Roberts*, 120 Mass. 227.

² *Brown v. Chicago, &c. R. R. Co.*, 53 Iowa, 595; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 N. Y. 5; *Booth v. Boston, &c. R. R. Co.*, 73 N. Y. 38; *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 522; *Brickner v. N. Y. Central R. R. Co.*, 2 Lans. (N. Y.) 506; *Kirkpatrick v. N. Y. Central R. R. Co.*, 79 N. Y. 240. In *Stevenson v. Jewett*, 16 Hun (N. Y.), 210, the plaintiff's intestate was a fireman in the defendant's employ, and was killed by the explosion of a boiler of a locomotive. The boiler was

shown to be defective and out of repair. It was also shown that it had been at the repair-shop six months before the explosion, and that the defects in it could have been ascertained upon examination. It was held that the superintendent having charge of the repairs stood in the place of the company, and that any fault on his part was the fault of the company. The plaintiff was nonsuited in the lower court, but the nonsuit was set aside.

³ Wharton on Negligence, § 229.

⁴ *Malone v. Hathaway*, ante; *Mullan v. Steamship Co.*, 78 Penn. St. 26.

⁵ *Corcoran v. Holbrook*, 59 N. Y. 517; *Brickner v. R. R. Co.*, 2 Lans. (N. Y.) 506; affirmed, 49 N. Y. 672; *Malone v. Hathaway*, ante; *Mullan v. Steamship Co.*, ante.

matters he is a mere co-servant; and the question is, not whether the master reserved any oversight or discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties to the servant injured.¹ In England it is held that in some cases the master may be held chargeable for the negligence of a middleman, when he stands in such a relation that he may fairly be said to be a vice-principal;² and in other cases the master has been held chargeable for the negligence of a middleman, when he occupied the position of foreman in a single department of the business, when he acted for the master in reference to a duty which the master owed to the servant as a personal or absolute duty.³ Thus, in a recent Iowa case,⁴

¹ Wood's Law of Master & Servant, 860; Ford v. Fitchburg R. R. Co., 110 Mass. 240; Mann v. Oriental Print Works, 11 R. I. 187; Laning v. R. R. Co., 49 N. Y. 521; Flike v. Boston & Albany R. R. Co., 53 id. 551; Brickner v. R. R. Co., 2 Lans. (N. Y.) 506; Corcoran v. Holbrook, 59 N. Y. 517; Grizzle v. Frost, 3 F. & F. 622; Murphy v. Smith, ante; Brabbitts v. R. R. Co., 37 Wis. 271; Mullan v. Steamship Co., 78 Penn. St. 26; Siegel v. Schantz, 2 T. & C. (N. Y.) 353; R. R. Co. v. Fort, 17 Wall. (U. S.) 383; Wright v. N. Y. C. R. R. Co., 28 Barb. (N. Y.) 80; Little Miami R. R. Co. v. Stevens, 20 Ohio St. 415; R. R. Co. v. Thomas, (Ala.), 8 Am. Law Reg. (N. S.) 154. In Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep. 424, the court held that a servant intrusted with authority to employ and discharge servants, and to provide and select materials, is not a co-servant. In Harper v. Indianapolis R. R. Co., 47 Mo. 567, 4 Am. Rep. 353, WAGNER, J., said: "When they delegate powers to an agent, and he executes that power, it is the act of the company." In Ohio, &c. R. R. Co. v. Callarn, 73 Ind. 261, 38 Am. Rep. 134, a master-mechanic, who was intrusted with the duty of employing and discharging the engineers and firemen employed upon the road, was held to stand in the place of the master as to such service, and the plaintiff having been injured by reason of the negligence or incompetence of a fireman, who, according to a practice among engineers on the road, had been temporarily left in charge of the engine, it being shown that the master-mechanic

knew of this practice, and took no measures to put a stop to it, it was held that the knowledge of this practice by the master-mechanic must be treated as the knowledge of the master, and his negligence in that regard, the negligence of the master, rendering the company liable for the injury. See also Baulec v. New York, &c. R. R. Co., 59 N. Y. 356; 17 Am. Rep. 325. Sustaining the rule advanced in the text, see Gunter v. Grantville Mfg. Co., 18 S. C. 262; Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Brann v. Chicago, &c. R. R. Co., 53 Iowa, 595; Hough v. R. R. Co., 100 U. S. 213; Mehan v. Syracuse, &c. R. R. Co., 73 N. Y. 585; Booth v. Boston & Albany R. R. Co., 73 id. 38; 29 Am. Rep. 97; Corcoran v. Holbrook, 59 N. Y. 517.

² Wilson v. Merry, L. R. 3 Sc. App. 326.

³ Grizzle v. Frost, 3 F. & F. 623; Murphy v. Smith, 19 C. B. N. S. 361; Walker v. Balling, 25 Ala. 294; Brickner v. N. Y. Central R. R. Co., 2 Lans. (N. Y.) 506; affirmed, 49 N. Y. 672; Chapman v. Erie R. R. Co., 55 N. Y. 579; Houston, &c. R. R. Co. v. Dunham, 49 Tex. 1; Bridges v. St. Louis, &c. R. R. Co., 6 Mo. App. 389; Lewis v. St. Louis, &c. R. R. Co., 59 Mo. 495; Patterson v. Pittsburgh, &c. R. R. Co., 76 Penn. St. 389; Flike v. Boston, &c. R. R. Co., 53 N. Y. 549; Gilman v. Eastern R. R. Co., 13 Allen (Mass.), 383; Fort v. Whipple, 11 Hun (N. Y.), 586.

⁴ Brann v. Chicago, &c. R. R. Co., 53 Iowa, 595; 36 Am. Rep. 243; Greenleaf v. I. C. R. R. Co., 29 Iowa, 14; 4 Am. Rep.

a brakeman was injured by the failure of the company to have its cars properly inspected. The company had an inspector whose duty it was to inspect its cars and machinery, but he failed to discharge his duty in this instance; and the court held that the company was liable if the jury should find that the injury resulted from

181; *Kroy v. C., R. I., & P. R. R. Co.*, 32 Iowa, 357; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Shanny v. Androscoggin Mills*, 66 id. 420; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Gilman v. Eastern R. R. Co.*, 10 id. 233; 13 id. 433; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 241; 14 Am. Rep. 598; *Mullan v. Philadelphia & Southern Mail Steamship Co.*, 78 Penn. St. 25; 21 Am. Rep. 2; *Chicago & Northwestern R. R. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Brabbitts v. C. & N. W. R. Co.*, 38 Wis. 298; *Harper v. R. R. Co.*, 47 Mo. 567; 4 Am. Rep. 355; *Brothers v. Cartter*, 52 Mo. 373; 14 Am. Rep. 424; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; *Thompson v. Drymala (Minn.)*, 1 N. W. Rep. 255; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Laning v. N. Y. C. R. R. Co.*, 49 id. 522; 10 Am. Rep. 417; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Tuttle v. C., R. I., & P. R. R. Co.*, 48 Iowa, 236. See also *Durkin v. Sharp*, 88 N. Y. 225, in which the plaintiff's intestate, an engineer employed by the defendant, was killed, while on one of the defendant's trains by the derailment of the engine and train. At the place where the accident took place the track was defective. But it was proved that at the time of the accident the flange of the forward left-hand wheel of the engine was broken. The train was at the time running east at considerable speed around a curve curving to the right. Broken pieces of the flange were picked up on the track at a point west of the place where the train was derailed. It was contended by defendant that the flange of the wheel broke before the train left the track, and that the breaking caused it to do so. The plaintiff contended that the fracture of the flange took place after the derailment and had nothing to do with it. It was proved that the fracture of the flange was due to an un-

discoverable flaw in the wheel. The court charged the jury that if they believed intestate came to his death by reason of a defect in the wheel, plaintiff could not recover, but left it to them to say whether the derailment was caused by the defect in the track or the breaking of the wheel; and it was held to be correct. The defendant requested the court to charge "that if the jury believe the track had been inspected within a reasonable time prior to the accident by a competent inspector of the defendant, and had been by him adjudged to be in a safe condition, the plaintiff cannot recover," which was refused. *Tracy, J.*, said: "*The inspection of the track was a duty of the master. If negligently performed, even by a competent inspector, the master would still be liable. To excuse him from liability the track must have been carefully inspected by a competent inspector.*" But see *Smith v. Flint, & C. R. R. Co.*, 46 Mich. 258, in which it was held that the inspectors of cars, etc., are mere fellow-servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers. *Mich. Cent. R. R. Co. v. Leahey*, 10 Mich. 199; *Davis v. D. & M. R. R. Co.*, 20 id. 105; *Mich. Cent. R. R. Co. v. Dolan*, 32 id. 510; *Fort Wayne & Sag. R. R. Co. v. Gildersleeve*, 33 id. 133; *Botsford v. M. C. R. R. Co.*, id. 256; *C. & N. W. R. R. Co. v. Bayfield*, 37 id. 205; *G. R. & I. R. R. Co. v. Huntley*, 38 id. 537; *M. C. R. R. Co. v. Austin*, 40 id. 247; *Day v. T., C. S., & D. R. R. Co.*, 42 id. 523; *Quincy Mining Co. v. Kitts*, id. 34; *Mich. Cent. R. R. Co. v. Smithson*, 45 id. 199. In Wisconsin, it is held that a railway company receiving a car from another company as a part of its train, has a right to assume that it is in proper repair, and is not bound to inspect it. *Ballou v. Chicago, & C. R. R. Co.*, 54 Wis. 259; 41 Am. Rep. 31.

a defect which could have been discovered by reasonable diligence. The company's duty being to use reasonable care to provide safe machinery and appliances for its business, and to employ competent and skilful workmen, it would be the height of absurdity to say that it discharged this duty by delegating the power to a competent agent; and that, in an action by an employé for an injury resulting from the negligence of such agent, the whole inquiry is limited to the question whether it had used due care *in the selection of such agent*. The duty is affirmative and active, and must be performed with reasonable care; and if not so performed, whether the agent to whose performance it was entrusted was competent or not, the company is liable. In a New York case,¹ the company employed an agent whose duty it was to employ men for a particular department of service. He employed a foreman who was competent when employed, but subsequently, to the knowledge of the agent employing him, became incompetent by reason of his intemperate habits; and the plaintiff receiving an injury by reason of such foreman's incompetency, it was held that the negligence of the agent in retaining him was attributable to the company. In a later case,² the company was held liable for the default of its train-dispatcher in sending out a train with an insufficient number of brakemen; and the justice of this doctrine is too apparent to need any argument in its support. But it only applies as to those matters in which the company owes an absolute duty to the employé. The inquiry therefore in all cases where a servant is injured by a defect in any of the appliances of the business is, whether the company was negligent in respect thereto. The mere circumstance that the appliance was defective does not of itself establish negligence, but it must also be shown that the company knew or ought to have known that it was defective;³ and the knowledge of the agent on whom devolves the

¹ *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 521.

² *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549.

³ *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; *Chicago, &c. R. R. Co. v. Platt*, 89 Ill. 141. A statement made by the mechanic in charge of the shops where the defendant procured its repairs to be made, in reply to complaints made to him of a defective car, that it ought not to be made use of for coupling with the coupler on the other cars, is not evidence of assur-

ances by defendant that its use would be discontinued, and has no tendency to make out a case of negligence on the part of the defendant towards its employés. *Fort Wayne, &c. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Botsford v. Michigan Central R. R. Co.*, ib. 256. It is the duty of a servant of a railway company, where the defect is patent, to report the fact to the company, and it is negligence on his part to fail to do so; and the company will not be liable for any injury sustained by him, occasioned by such machi-

duty of attending to the repairs, etc., is the knowledge of the com-

ery being out of repair. *Toledo, Wabash, & Western R. R. Co. v. Eddy*, 72 Ill. 138; *Patterson v. Pittsburgh, &c. R. R. Co.*, 76 Penn. St. 389. It is a question of fact whether a train-master charged with the duty of examining for defects in machinery, etc., actually knew or could have known the defect causing his own death. His duty as employé does not, as matter of law, relieve the company employing him from responsibility for negligence in the use of defective machinery. *International, &c. R. R. Co. v. Kindred*, 57 Tex. 491. In an Illinois case a brakeman was injured in the course of his employment, while coupling two sections of a train; and there was evidence tending to show that the injury was caused by the use of a defective switch-engine. The engine-driver whose duty it was, had several times previously notified the foreman of one of the company's repair-shops of the defective condition of the engine. The foreman had charge of all the men employed in the repair-shop, and was the person to whom such defect should have been reported, and it was his duty to see it repaired. Another person, known as the master-mechanic, had general supervision of all repairs of the motive power, tools, and machinery of the company, and general charge of all the men employed in the locomotive department, including the power-to-employ men in or discharge them from service in that department; while such foreman had no such power to employ or discharge men without the master-mechanic's consent. It was held that an instruction to the effect that notice to such foreman of the defect was notice to the company, was correct. The foreman being the person designated by the company to whom notice of any defect in the engine was to be given, and whose duty it was to repair it, his negligence in that behalf was the negligence of the company, for which the company is liable. *Brabbitts v. Chicago & Northwestern R. R. Co.*, 38 Wis. 289. If an injury occurs through a defect or insufficiency in the machinery furnished to the employés by the company, knowledge of the defect or insufficiency must be brought home to the company, or

it must be proved that it was ignorant thereof through its own want of care, before the company can be made liable. *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545. In a North Carolina case, on the trial of an action for damages for an injury received by the plaintiff while coupling cars, the court declined to charge the jury that "if they believed that the plaintiff knew, or had reasonable grounds for believing, that the engine used by defendant prior to the time of the injury complained of was not controllable by the engine-driver, and that the road-bed was in a dangerous condition, and the plaintiff was injured thereby, then the plaintiff was guilty of contributory negligence and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or road-bed." It was held that the instruction should have been given. *Crutchfield v. Richmond, &c. R. R. Co.*, 78 N. C. 300. From the fact that the company had notice of the defect in the engine, and from other circumstances connected with it, in evidence a presumption may arise that the deceased was induced by the employer's servants to believe the defect would be speedily obviated, and continued in the employment for that reason. *Morris v. Indianapolis & St. Louis R. R. Co.*, 10 Brad. (Ill.) 389. But where an employé sues for an injury caused by a defective car, there must be an averment that the car was defective when placed upon the road, or, if it subsequently became defective, that notice of the defect was brought home to the company. *Kidwell v. Houston, &c. R. R. Co.*, 3 Woods (U. S. C. C.) 313. The fact that an employé knowingly undertook to use a dangerously defective tool under the immediate command of a superior employé will not give him a right to recover. *Baker v. Western & Atlantic R. R. Co.*, 68 Ga. 699. *Baltimore & Ohio R. R. Co. v. Whittington*, 30 Gratt. (Va.) 805. In a Tennessee case, it was held that where a laborer engaged in driving spikes and furnished by the section-boss with an iron maul known by the latter to be defective, was injured in consequence of such defect, the company is liable al-

pany.¹ In an Indiana case² this rule was applied where an employé

though the defect was patent and would have been known to the servant had he inspected the maul. *Guthrie v. Louisville, &c. R. R. Co.*, 11 Lea (Tenn.), 372. But the doctrine of this case is doubtful and opposed to the rule that a servant must see a patent defect, and seeing it uses the instrument at his own risk. Where a master has expressly promised to repair a defect in the machinery used by the servants in his employment, the servant may recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance. *Parody v. Chicago, &c. R. R. Co.*, 15 Fed. Rep. 205; *Hough v. R. R. Co.*, 100 U. S. 213. Where push-cars are furnished by a railway company to be used in carrying materials, and to be propelled by pushing, it is not negligence in the company to fail to supply them with brakes or other means of controlling their movement. *Miller v. Union Pacific R. R. Co.*, 17 Fed. Rep. 67. Although the statute relating to the use of machinery connected with tumbling-rods makes a party who shall use such tumbling-rods, without being properly boxed or secured, liable to a person injured thereby, yet in such cases the rule of contributory negligence prevails, as in

other cases; and if the party injured is guilty of contributory negligence, he cannot recover. *Wabash, St. Louis, &c. R. R. Co. v. Thompson*, 10 Brad. (Ill.) 271. In an Ohio case the plaintiff was employed by the defendant to operate a turn-table by a crank that was stationary upon and revolved with the turn-table, and a track was laid in such proximity to the turn-table that while an engine was on the turn-table, being turned by the plaintiff, it was struck by an engine passing upon the track, causing the crank to strike the plaintiff by a reverse motion. It was held that the question of negligence was for the jury. *Lake Shore, &c. R. R. Co. v. Fitzpatrick*, 31 Ohio St. 479.

¹ *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240. In this case the plaintiff was injured by the explosion of an engine which he was running as engineer. The defendant had a master-mechanic who had charge of the repair of its locomotives, as well as the power to direct what engines should be used, and by whom, as well as the appointment of engineers. The plaintiff had called the master-mechanic's attention to this engine several times, and was told that there was no trouble with it, and to continue to run it. The company was held liable, *Colt, J.*, saying: "The

² *Ohio, &c. R. R. Co. v. Collarn*, 73 Ind. 261; 38 Am. Rep. 134. In *Pittsburgh, &c. R. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111, *Downey, J.*, speaking for the court, said: "We think that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation, and we do not see any reason why this rule is not applicable here. . . . As it was the duty of the master of transportation to communicate all matters concerning his agency to his principal, it may be presumed that he did so. But whether he did so or not, notice to him is notice to his principal, when it relates, as it did here, to the business which he was transacting for the company. He was placed in his position that he might make himself acquainted with the conduct of those who were placed

under his direction and control, and he seems to have had the power to appoint and remove, promote and degrade, those who were engaged in the business of which he had the oversight." In *Baulec v. New York, &c. R. R. Co.*, 59 N. Y. 356, 17 Am. Rep. 325, it is said that "when the master is a corporation, necessarily acting by and through agents, the acts of its general agents charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment." *Harper v. Indianapolis & St. Louis R. R. Co.*, 47 Mo. 567, 4 Am. Rep. 353; *Patterson v. Pittsburgh, &c. R. R. Co.*, 76 Penn. St. 389; 18 Am. Rep. 412.

of a railway company was injured by one of its locomotives, owing to the incompetency of the fireman in whose charge the engineer had left

agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants with those engaged in operating it. *They are charged with the master's duty to his servants.* They are employed in a distinct and independent department of service, and there is no difficulty in distinguishing them, even where the same person renders service by turns in each, as the master's convenience may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may." In *Fuller v. Jewett*, 80 N. Y. 48, the injury resulted from an explosion of a locomotive, which had been for some time out of repair, and had several times been sent to the shop for repairs, and the fault was that the superintendent of repairs did not properly discharge his duty in making the repairs. The court held that the company was liable. *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 551; *Booth v. Boston & Albany R. R. Co.*, 73 id. 39; *Mehan v. Syracuse, &c. R. R. Co.*, 73 id. 585. In *Chicago, &c. R. R. Co. v. Rung*, 104 Ill. 641, a switchman was injured while coupling cars, by reason of a defect in the throttle-valve of the locomotive, which caused a sudden and unexpected movement of the locomotive. The defect was known to the engine-driver, who had often called the attention of the foreman at the round-house to the defect. The court held that the company was not absolved from liability for the death of intestate on the ground that the negligence of the mechanics was that of co-employees of intestate. Where an employé, while repairing a car on a side-track, was struck by another car, which was moved against him by an engine attached thereto, and the engine was moved by the escape of steam through a defective valve into the cylinder, which defect had been known to the defendant's superintendent for several months, and it had been left without any attempt to repair it, so as to prevent the escape of the steam, it was held that defendant was liable for the injury sus-

tained. *Cone v. Delaware, &c. R. R. Co.*, 15 Hun (N. Y.), 172. And it is no defence that the engine-driver could have so managed the engine as to have prevented the accident. *Cone v. Delaware, &c. R. R. Co.*, 81 N. Y. 206; *Kirkpatrick v. New York Central, &c. R. R. Co.*, 79 N. Y. 240; *Cunningham v. Chicago, &c. R. R. Co.*, 12 Am. & Eng. R. R. Cas. (Minn.) 217. In Tennessee it is held that subordinates under the control of a superior are entitled to regard him as representing the master, and the master is responsible for his incompetency or misconduct. This rule was held to apply to an explosion of a boiler by which an engineer was killed. *Nashville & Decatur R. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Cumberland, &c. R. R. Co. v. State*, 44 Md. 283; *Murphy v. Boston & Albany R. R. Co.*, 8 Abb. N. C. (N. Y.) 41. Where an engine-driver was killed by the explosion of a boiler of a locomotive, and it appeared that the boiler was made of the best material, and by first-class manufacturers, and had not been used long enough to create any suspicion of its unsafe condition, and the defect was not of such character as could have been discovered by any of the tests usually employed for the purpose, and there was no sign or indication of its unsafety, it was held that the company was not liable for the injury. *Indianapolis, &c. R. R. Co. v. Toy*, 91 Ill. 474. The fact of the explosion of the boiler of a locomotive, killing a person not in the employ of the railroad company, and in no way connected with it, is *prima facie* evidence of negligence in the company. But where such an explosion happens through the negligent manner in which the engine is managed by the engine-driver, and kills the latter; or, if he had good reason to believe that the boiler was unsafe, or if, by the exercise of ordinary skill, he could have learned that the engine was unsafe, and still used it, no recovery can be had for his death. The explosion will not afford *prima facie* evidence of negligence against the company. *Toledo, Wabash, & Western R. R. Co. v. Moore*, 77 Ill. 217. But although the *prima facie* presumption from an explo-

it. It was proved that the engineers were in the habit of so leaving their engines in charge of the firemen, and that this fact was known to the master-mechanic whose duty it was to employ and discharge engineers. The company was held liable. In Vermont¹ this rule was applied in a case where a fireman was killed by the washing out of a culvert. It was held that the negligence of the defendant's road-master whose duty it was to see that the road was kept in proper repair was attributable to the company.²

SEC. 378. Not Bound to Adopt latest Improvements.—A master is not bound to adopt the latest improvements in machinery, nor is he liable for an accident which would not have occurred if such improvements had been adopted.³ He is not required to furnish the best appliances possible to be obtained,⁴ but they must be reasonably safe, and kept so.⁵ But in Illinois it is held that he is bound to use

sion of the boiler of a locomotive is, that there was negligence, either in testing or putting the materials together, or that it has been negligently used, yet when suit is brought by the engine-driver who had charge of the engine, or his representatives, against the person owning the engine, there is no presumption in his favor that the explosion resulted from defects in the boiler, rather than from its negligent use, and the burden is on the plaintiff to show that he was not negligent. *Illinois Central R. R. Co. v. Houck*, 72 Ill. 285.

¹ *Davis v. Central Vt. R. R. Co.*, 55 Vt. 84.

² See also *Hough v. Railroad Co.*, 100 U. S. 213; *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268. In *Cowles v. Richmond & Danville R. R. Co.*, 84 N. C. 309, 37 Am. Rep. 620, it was held that an action for damages for an injury received by the plaintiff, employé of a railroad company, will not lie against the company if it resulted from the negligence of a fellow-servant occupying the same level with the plaintiff, where the company used due care in the selection of such fellow-servant. But such action will lie, if the injury resulted from the negligence of a servant whose commands the plaintiff was bound to obey. In *McMahon v. Henning*, 3 Fed. Rep. 353, it was held that a master is liable for negligence in permitting the use of defective machinery, whereby his servant was injured, although the negli-

gence of a fellow-servant contributed to the injury. This is consistent with *Booth v. Boston & Albany R. R. Co.*, 73 N. Y. 38, 29 Am. Rep. 97, where the injury was caused by the negligence of the company in not furnishing a sufficient number of brakemen on a train, and the negligence of the engineer in running the train; and with *Stetter v. Chicago & N. W. R. R. Co.*, 46 Wis. 497, 29 Am. Rep. 102, note, where the injury was caused by the subsidence of an unsafe track, and the negligence of the conductor in disregarding his instructions to run slowly over it.

³ *Norfolk, &c. R. Co. v. Jackson*, 85 Va. 492; *Louisville, &c. R. Co. v. Allen*, 78 Ala. 494; *Stack v. Patterson*, 6 Phila. (Penn.) 225; *Nashville, &c. R. Co. v. Elliott*, 1 Cold. (Tenn.) 612; *Wonder v. Baltimore, &c. R. Co.*, 32 Md. 411; *Ladd v. New Bedford, &c. R. Co.*, 119 Mass. 412; *Cogney v. Hannibal, &c. R. Co.*, 69 Mo. 416; *Baldwin v. Chicago, &c. R. Co.*, 50 Iowa, 680; *Osborn v. Knox, &c. R. Co.*, 68 Me. 49; *Piper v. N. Y. Central, &c. R. Co.*, 1 T. & C. (N. Y.) 290; *Fort Wayne, &c. R. Co. v. Gildersleeve*, 33 Mich. 256; *Botsford v. Mich. Central R. Co.*, 33 Mich. 256; *Lake Shore, &c. R. Co. v. McCormick*, 74 Ind. 440.

⁴ *Pittsburgh, &c. R. Co. v. Sentmeyer*, 92 Penn. St. 275.

⁵ *Atchison, &c. R. Co. v. Holt*, 29

such machinery as is found to be safest when applied to use, but that he is not required to seek out and adopt new inventions.¹

If the employes know that the rails are old and worn, or that the machinery is less safe than that generally employed upon other roads, and continue to use them without objection or complaint, they cannot hold the company responsible for injuries arising from such defects.² In this class of cases the inquiry is not whether better appliances might have been furnished, but whether the company is chargeable with negligence in furnishing or using the appliances in question.³ In a Maryland case,⁴ the plaintiff, who was a brakeman on the defendant's road, was injured by an alleged defect in a brake to one of the cars he was using in the regular course of his duty. The defect consisted in the use of a hook, instead of an eyebolt on the brake, and in having the point of the hook turned the wrong way. It was held that in the absence of proof that the employment of such a brake was negligent, there could be no recovery.⁵ The master is only liable to a servant for injuries resulting to the servant in the discharge of his duties in the department of labor or employment for which he was engaged; therefore, if a servant who is employed to work in one department, without the knowledge of his master goes to work in another department of the business, which is more hazardous, he cannot recover of the master for injuries resulting to him in such labor from defects in the machinery or appliances, because the master owes no duty to him in respect thereto.⁶

SEC. 379. When patent Defects do not excuse Master's Liability. —

A servant is bound to see patent and obvious defects in the appliances, and is generally estopped from a recovery for injuries received therefrom when he continues to use them *knowing* the danger.⁷ Thus, where there are dangerous projections over the

Kan. 149; *Gravelle v. Minneapolis, &c. R. R. Co.*, 11 Fed. Rep. 569; *Totten v. Penn. R. R. Co.*, 11 Fed. Rep. 564.

¹ *Toledo, &c. R. R. Co. v. Asbury*, 84 Ill. 420. See also *Dorsey v. Phillips, &c. Co.*, 42 Wis. 583; *Smith v. N. Y. & Harlem R. R. Co.*, 19 N. Y. 127; *St. Louis, &c. R. R. Co. v. Valirius*, 56 Ind. 511.

² *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *International, &c. R. R. Co. v. Doyle*, 49 Tex. 190; *Kelly v. Silver Spring Co.*, 12 R. I. 112; *Michigan Central R. R. Co. v. Austin*, 40 Mich. 247; *Fort Wayne, &c. R. R. Co. v. Gildersleeve*, 83 Mich. 133.

³ *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Wonder v. Baltimore, &c. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143.

⁴ *Wonder v. Baltimore, &c. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143.

⁵ See *De Graff v. N. Y. C. R. R. Co.*, 3 T. & C. (N. Y.) 255, as to switches; *Salters v. Del. & Hud. Canal Co.*, 5 id. 290; *Piper v. N. Y. C. R. R. Co.*, 2 id.

⁶ *Brown v. Byroads*, 47 Ind. 435.

⁷ *Dynen v. Leach*, 26 L. J. N. S. Exchq. 222; *Brown v. Accrington*, 3 H. & C. 511; *Assop v. Yates*, 2 H. & N. 768; *Senior v. Ward*, 1 El. & El., 385; *Seymour v. Maddox*, 16 Q. B., 332; *Ryan v. Fowler*,

track, as awnings,¹ low bridges,² or roofs of buildings,³ of the existence of which the servant knows, by remaining in the employ of the company after such knowledge, he accepts and assumes the risk incident thereto. But if the servant is not aware of the danger, — as, if he has never been over the road before, and has not been duly warned, — or if he has complained of the projection and the company has promised to remedy it, the rule is otherwise. Thus, in an Illinois case,⁴ the plaintiff was a brakeman on the defendant's railroad. At its station at Mendota, within about eighteen inches from the track, an awning projected from the station-house, so that when a freight-car stood upon the track in front of it the edge of the car would be about even with the outer edge of the awning; and the awning was about eighteen inches higher than the top of the cars. On the occasion of the happening of the injury, as the cars were coming into Mendota, at a rate of speed about as fast as a man could walk, Welch was walking by the side of the train for the purpose of cutting off a portion of it. There was a ladder on each side of the car. The plaintiff had pulled out the pin and disconnected a portion of the train from the engine, and was walking along beside the train, when the engineer signalled for brakes. The plaintiff ran up the ladder on the car on the side next the station-house, and before he reached the roof of the car he was struck by the projecting awning and knocked from the car; his left arm was broken, and injured so that it had to be amputated. The attention of the division-superintendent and division-engineer had been some time previously called to the dangerous position of this awning. When the engineer called for brakes, it was the duty of the appellee to mount the car for the purpose of applying them. It did not appear that the plaintiff knew of the dangerous proximity of the awning, and the court held that it could not under the circumstances be presumed that he had such knowledge.⁵

24 N. Y. 410; *De Graff v. N. Y. Central R. R. Co.*, 3 T. & C. (N. Y.) 255; *Railroad Company v. Jackson*, 55 Ill. 492; *Sullivan v. Louisville R. R. Co.*, 9 Bush (Ky.), 81.

¹ *Clark v. St. Paul, &c. R. R. Co.*, 28 Minn. 128. But see *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183; 4 Am. Rep. 593.

² *Baltimore, &c. R. R. Co. v. Stricker*, 51 Md. 47; *Gibson v. Midland R. R. Co.*, 2 Ont. 658; *Baylor v. Delaware, &c. R. R.*

Co., 40 N. J. L. 23; *Nelson v. Atlantic, &c. R. R. Co.* 68 Mo. 593; *Rains v. St. Louis, &c. R. R. Co.*, 71 Mo. 464; *Wells v. Burlington, &c. R. R. Co.*, 53 Iowa, 520; *Owen v. N. Y. Central R. R. Co.*, 1 Lans. (N. Y.) 449.

³ *Gibson v. Erie R. R. Co.*, 63 N. Y. 549.

⁴ *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183.

⁵ See also *Chicago, &c. R. R. Co. v. Russell*, 91 Ill. 298, in which it was held

But where the servant *knows or ought to know* of the obstruction, he cannot recover for an injury received therefrom, because by reason of his failure to guard against it, and neglecting to do so, he is treated as being guilty of contributory negligence.¹ Thus, in the case last cited, a brakeman, called upon suddenly to apply the brakes to a train, was hit by the roof of a bridge over the road, and injured. The bridge was not high enough to permit a person to stand upright on the cars in passing through it, and it appeared that it was not usual or customary for railroad companies to build their bridges with an elevation sufficient to enable a person to stand upright on the top of the cars in passing through them; and the court held that there could be no recovery for the injury, upon the ground that the plaintiff was chargeable with knowledge of the method of building such bridges, and assumed the risk incident thereto.² But as the doctrine of these cases proceeds upon the ground that the servant knew of the hazard, or ought to have known of it, and therefore assumed the risk incident to it, it follows as a matter of course that if the circumstances are such that the servant cannot be charged with such knowledge, liability would ensue; as, if the company should, without notice or warning to its employes, erect a low, covered bridge where there had before been an open one, or one which admitted of a person passing through it standing upright upon the cars; or should erect or permit others to erect structures along its line in such close proximity to the track as to be productive of injury to an employe in the discharge of his duties, the company would be liable, until the lapse

that where a brakeman in the defendant's employ, while descending the ladder of a freight-car to throw a switch, was struck by a telegraph-pole only eighteen inches from the track, and thrown between the cars and killed, the company was liable; and that the dangerous proximity of the pole, whether placed there by the company or third persons, raised a presumption of negligence; and that notice to the company of the obstruction would be presumed from the lapse of such a period of time as would enable it to acquire knowledge thereof.

¹ *Baylor v. Del., Lack., & Western R. R. Co.*, 40 N. J. L. 23.

² *Gibson v. Erie R. R. Co.*, 63 N. Y. 449; 20 Am. Rep. 552; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412. In

Lovejoy v. Boston & Lowell R. R. Co., 125 Mass. 79, an engineer in the defendant's employ, while leaning out of the engine he was running, looking for signals from the conductor, was injured by his head coming in contact with a signal-post, three feet and eight inches from the track, and visible half a mile away; there were many other signal-posts and other erections along the track at the same distance from it; he knew those facts, but had not noticed this particular post. It was held that he was not entitled to recover, as he knew the danger, and assumed the risk. In *Northern R. R. Co. v. Husson* (Penn.), 12 Am. & Eng. R. R. Cas. 241, a brakeman was caught by bridge-irons of the existence of which he knew, and was killed. It was held that there could be no recovery.

of such a period of time that it could be presumed that the servant knew of the changed conditions.

An employé of a railway company who has had any experience in the business is bound to know what risks are usually incident to the service, and the condition of buildings, bridges, etc., upon its line; and if such erections either over or along its line are such that he can discharge his duties safely, by the exercise of ordinary care, he cannot recover for an injury resulting to him therefrom. Thus, if an employé in the performance of his duty is not required to expose his person outside the outer surface of the cars, he cannot recover of the company for an injury sustained by the close proximity of a coal-chute or other erection,¹ by reason of a needless exposure of his person. But where the servant is required to do so, in the line of his duty, as in the case of an engineer or fireman to look out for obstacles upon the track, or of brakemen in giving signals to the engineer, etc., the rule would be otherwise, as the company is required to have its roadway in such a condition *that a servant can perform all the duties required of him with reasonable safety.*² Where a railroad company is in the habit of receiving from other lines cars loaded with timbers, which project over the ends of the cars so as to make it dangerous for any one except a careful and skilful person to attempt to couple the cars, it is not negligence for the company to order and permit such a person, who has been in its employ doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in daylight, although it may be raining at the time.³ In a Michigan case,⁴ an experienced

¹ Allen v. Burlington, &c. R. R. Co., 57 Iowa, 623; Lovejoy v. Boston, &c. R. R. Co., 125 Mass. 79, where the employé was hit and injured by a signal-post. Dorsey v. Phillips, &c. Construction Co., 42 Wis. 583. See also, to the same effect, where the injury resulted from the employé being hit by a water-tank near the track, Atlanta, &c. R. R. Co. v. Webb, 61 Ga. 586. See Atchison, &c. R. R. Co. v. Retford, 18 Kan. 245, where a baggage-man was injured by a coal-chute; and the fact that, upon complaint being made of its dangerous proximity to the track, the company removed it, was held admissible upon the question of negligence. But *quære*.

² Chicago, &c. R. R. Co. v. Russell, 91 Ill. 298. In this case the injury was re-

ceived by a brakeman in the line of his duty, by being hit by a telegraph-pole erected so near the line that in descending from the top of a car he was hit and injured by it. The company was held liable. See also Hall v. Union Pacific R. R. Co., 16 Fed. Rep. 744.

³ Atchison, Topeka, & Santa Fe R. R. Co. v. Plunkett, 25 Kan. 188.

⁴ Day v. Toledo, Canada Southern, & Detroit R. R. Co., 42 Mich. 523. See, as to negligent custom in loading timbers, Hamilton v. Des Moines Valley R. R. Co., 36 Ia. 31; as to injuries from collision of the train with cattle, Wabash, &c. R. R. Co. v. Brown, 2 Brad. (Ill.) 516; where it was held that the question of liability depended upon the circumstance whether the cattle were on the track by the fault of

brakeman was ordered by the conductor to couple a car loaded with lumber, which projected forward, and compelled him to stoop in making the coupling. In doing so, he delayed a little, and his fingers were caught in the coupling-link and hurt. It was held that he could not recover against the railway company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way. The servant assumes all patent or obvious risks, as well as those which he knows are incident to the business.¹ But instances may arise in which such knowledge will not prevent a recovery; as, where the servant is justified in believing that the risk is not as great as it appears to be,² or he

the company or not, the burden being upon the employé to show that they were.

¹ *Woodworth v. St. Paul, &c. R. Co.*, 18 Fed. Rep. 282; *Schultz v. Chicago, &c. R. Co.*, 44 Wis. 638; *Indianapolis, &c. R. Co. v. Flanigan*, 77 Ill. 365; *Fort Wayne, &c. R. Co. v. Gildersleeve*, 33 Mich. 133; *Botsford v. Michigan Central R. Co.*, id. 256; *Little Rock, &c. R. Co. v. Duffey*, 35 Ark. 602; *Bartonshill Coal Co. v. Reid*, 3 Macq. 275. *Wood on Master and Serv.*, Ch. XV. And the same is true as to one who undertakes an employment with full knowledge of the rules and methods pursued by the employer in the business; he cannot recover from the employer for an injury happening in consequence of such methods. *Kelley v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 53 Wis. 74. If an employé, knowing the hazard of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for such injury merely on the ground that there was a safer mode for conducting the business, the adoption of which would have prevented the injury. *Naylor v. Chicago & Northwestern R. R. Co.*, 53 Wis. 661. And the employer will not be liable to him for an injury caused without his fault, when he does nothing to render the service more dangerous than it was known to be by the employé before he engaged in it. *Clark v. Chicago, Burlington, & Quincy R. R. Co.*, 92 Ill. 43. As to injuries received while "bucking" snow, see *Howland v. Milwaukee, &c. R. R. Co.*, 54 Wis. 226; *Morse v. Minneapolis, &c. R. R. Co.*, 30

Minn., 465. As to injuries received from damaged cars when it is the employé's duty to take such cars to the repair-shop, — *Watson v. Houston, &c. R. R. Co.*, 58 Tex. 434.

² *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Patterson v. Pittsburgh, &c. R. R. Co.* 76 Penn. St. 389; 18 Am. Rep. 412. The rule is that the servant, as to all latent defects or dangers, has a right to presume that the master has discharged his duty, and to act upon that presumption. *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Wonder v. R. R. Co.*, 32 Md. 411; *Michigan, &c. R. R. Co. v. Dolan*, 33 Mich. 510. But when the danger or risk is apparent, and known to the servant, he assumes the risk, unless there are circumstances that deprive his act of a negligent imputation, — as where the exigencies of the business required the doing of the very act in doing which the injury resulted, and did not necessarily expose him to danger. Thus, in a Massachusetts case that has in a measure come to be regarded as a leading case, *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441, the plaintiff, a switchman on the defendant's road, was required to uncouple some cars near the point where the train was then standing; and where the railroad crossed the highway three lengths of plank had been laid down between the rails, and up to within about two inches of them, entirely across the highway, and one of these planks had become defective, and there was a hole in it large enough to admit a man's foot. This hole had existed for more than two months, and the

may show that the master's attention has been called to the defect, and he has attempted to, or has promised to repair it.¹ But in the

plaintiff had known of it for that length of time, and had complained of it to the repairer of the defendant's tracks. At the time of the injury, he was engaged in distributing a freight train, and for the purpose of giving an impetus which should send the cars to a place where he wished them to be, he gave a signal to the engineer to back his engine; the engineer did so, setting the cars in motion at a very slow rate, and while they were so in motion he stepped between the engine and the car next to it, to take out the pin, and uncouple the cars near the place where the hole was, and while between the cars, trying to get the pin out, the train continued in motion, and he was compelled to take two or three steps with it, and as he pulled out the pin and was stepping away, his foot caught in the hole in the plank, and being unable to

extricate it, the fore-wheel of the tender ran over his leg, and injured it so badly that amputation became necessary. The circuit judge ruled that, under this evidence, the plaintiff being charged with knowledge of the defect, he could not recover; but upon appeal this ruling was reversed. In all such cases the question of negligence on the servant's part is a question for the jury. *Reed v. Northfield*, 18 Pick. (Mass.) 98; *Smith v. Lowell*, 6 Allen (Mass.), 40; *Snow v. Railroad Co.*, 8 id. 450. In *Plank v. New York C. R. R. Co.*, 60 N. Y. 607, it appeared that the deceased, at the time of the injuries resulting in his death, was a brakeman in defendant's employ, running upon a freight train. Such train stopped at Palatine Bridge and was backed on to a side track or turn-out to permit another train to pass. Some cars were standing

¹ *Clark v. Holmes*, 7 H. & N. 942. In this case, which is a leading case upon this question, the plaintiff was a servant in the defendants' cotton-factory. The statute required the machinery to be fenced. When the plaintiff entered the defendants' service, it was fenced, but after a few months, either from decay or other cause, the guard broke down, and the machinery remained unfenced. The plaintiff, whose duty it was to oil the machinery, complained several times that the machinery was unfenced, and the defendants promised that the guard should be restored; but this was not done, and some time afterward, the plaintiff, while oiling the machinery, in consequence of the want of a proper guard was seriously injured. The jury found that the plaintiff was not guilty of negligence contributing to the injury, either in the manner of oiling the machinery or in remaining in the service after the protection was removed, and returned a verdict for £200 damages in his favor, which was sustained upon appeal. The question is for the jury. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Hoey v. Railway Co.*, 18 W. R. 930; *Britton v. Cotton Co.*, L. R. 7 Exch. 180;

Laning v. N. Y. C. R. R. Co., 49 N. Y. 521; 10 Am. Rep. 417. In a more recent case in the English courts, *Holmes v. Worthington*, 2 F. & F. 533, the court reiterated the doctrine advanced in *Clark v. Holmes*, *ante*, and held that, although machinery becomes dangerous, yet, if the servant complains of it to the master, and continues to use it with a reasonable expectation that it will be repaired, and an accident happens through its defective condition, he is not, by his knowledge of such defects, precluded from a recovery. The question is for the jury whether he was, in fact, guilty of contributory negligence by remaining. But where work is being carried on, which is in part dangerous and unsafe by reason of the lack of certain precautions, and the master promises to adopt them, but before doing so, he goes away and leaves directions to have the work go on, and a servant, by reason of the lack of such precautions, is injured, he cannot recover, because it was negligence on his part to pursue his employment, knowing the danger, until the precautions were taken. *Smith v. Dowell*, 3 F. & F. 238.

latter instance, it must be apparent that in order to justify the servant in using the appliances under such a promise, he must either

on the switch, and the deceased was directed by the conductor to couple them to the train, and in obeying the order was injured. Plaintiff's evidence tended to show that, as deceased was engaged in the act of coupling, he stepped into a sluiceway or trench about two feet wide and deep, which ran under the tracks; it was walled up with stone and timbers laid across for the tracks; in the middle of the switch-track a board or plank was laid across, and some distance outside of the track, a stone; otherwise the trench was left open. It was in the night season, and there was no snow on the ground. It also appeared that the train of the deceased had been in the habit of stopping there, and that he knew of the trench. The trench, it appeared, had been there over ten years, in the same condition. Plaintiff was nonsuited. It was held error; that defendant was bound to provide an ordinary and reasonably safe place for the performance of the work of coupling cars; that the jury might have found that the plank across the trench was not a safe or convenient standing or walking place for one engaged in that work, as it was midway, and right under the attachment by means of which the cars were coupled, and that the trench made the place unsafe to a brakeman whose hands and eyes were engaged in the act of coupling; that it was to be presumed from the manner of the construction of the trench that it was put there by defendant's instrumentality, and that it was ordered by a superior officer or agent clothed with such powers as to be its representative, and not by a fellow-servant with the deceased; and that the evidence of defendant's negligence was sufficient to require the submission of the question to the jury; also that the fact of the knowledge of the deceased of the existence of the trench was not sufficient to charge him, under the circumstances, with contributory negligence, as the act in which he was engaged necessarily required his whole attention and thought; and that the act itself of coupling cars while in motion, was the usual, and almost the only method of doing it. *Patterson v.*

Pittsburgh, &c. R. R. Co., 76 Penn. St. 389, 18 Am. Rep. 412. See *Kroy v. Chicago, &c. R. R. Co.*, 32 Iowa, 357. It has been held that this applies also in cases where the servant has become aware of dangerous practices or customs indulged in by the master. *Balt. & Ohio R. R. Co. v. Woodard*, 41 Md. 298; *Marquette, &c. R. R. Co. v. Taft*, 28 Mich. 289. In *R. R. Co. v. Thomas*, 51 Miss. 637, the plaintiff was an engineer on the defendant's road. At the point where the injury was received, the switch and road-bed were out of repair, to the knowledge of the defendant and the plaintiff. It was held that no recovery could be had by the plaintiff, because, by continuing to incur the risk without objection or complaint, he must be regarded as having waived the risk. It is proper to say, however, that the plaintiff otherwise contributed to the injury, so that the former question was not very material in the case. See also *N. O., &c. R. R. Co. v. Hughes*, 49 Miss. 258. When it is said that a servant assumes the ordinary risks incident to the employment, it is merely intended to extend the rule to cover such injuries as by the exercise of ordinary care on the part of the master cannot be avoided by the servant, by the exercise of ordinary care on his part. The duty rests upon the master to exercise that care, and the servant has a right to rely upon his doing so; and failing in that respect, he is answerable to the servant for the consequences. The term "ordinary hazard" is used in a synonymous sense with unavoidable accident, and is extended no farther. The servant entering into an employment where dangerous machinery is used, knows, or is bound to know, that there may be latent defects in such machinery that ordinary care on the master's part would not detect, and that from such latent defects injuries may result to him; and such injuries, in law, are regarded as unavoidable, and an incident to the employment, and the servant takes the risk of such upon himself. But where an injury results from a latent defect that might have been discovered by the exercise of ordinary care on the master's part,

be justified in presuming that the repairs have been made, or that the master will make them within a reasonable time;¹ and the ques-

the injury is not unavoidable, and consequently is not an ordinary hazard incident to the business. The master is not bound to have the instrumentalities of his business *absolutely safe*, but he is bound to have them as safe as ordinary care on his part can provide; and this extends not only to the original act of providing them, but also to keeping them in repair. Machinery becomes weakened by age or use, and the master is bound to exercise such care against that contingency as men of ordinary prudence would exercise. The term "ordinary care" is a flexible one, and has no fixed meaning. What might be said to be ordinary care, in reference to one matter, might, as applied to another, be gross negligence; therefore, the measure of the term "ordinary care," and of the master's duty, is to be estimated from the nature of the implement, the use to which it is devoted, and the consequences to the servant in case it should prove defective, and therefore is a question of fact in each case for the jury. *Fletcher v. R. R. Co.*, 1 Allen (Mass.), 9; *Penn. R. R. Co. v. Ogier*, 35 Penn. St. 60; *Cayzer v. Taylor*, 10 Gray (Mass.), 274. We have, then, the master's duty on the one hand, and the servant's duty on the other; and while each discharges that duty, no liability exists for injuries resulting to the one or the other; not to the servant, for an injury to him by a defect in the machinery, because it is, in law, an unavoidable accident; not to the master, for an injury to the instrumentalities of the business, because that also was an unavoidable accident. But if either fails in the discharge of this duty, *even in the slightest degree*, liability attaches for the consequences, because in law it is the result of the carelessness of him who has relaxed his duty. Therefore, in all cases the relative duties of the parties, the one to the other, are to be balanced, and although both may in a measure have failed to discharge their duty fully, the question is, to whose act shall

the blame be imputed? whose act was the *proximate* cause of the injury? *Clayards v. Dethick*, 12 Q. B. 439. If the servant's act was such as a prudent man under *precisely the same circumstances* would not have done, then, although the master has utterly failed in his duty to the servant, no recovery can be had; for if the servant did not exercise ordinary care, and that want of care on his part contributed to the injury, — that is, if the injury would not have happened except for his want of care, — the fault cannot be imputed to the master, although his breach of duty also contributed to the injury. But, in measuring the degree of care to be exercised by the servant, and determining whether or not a particular act was negligent, reference must be had to *the circumstances and the exigencies of the business*; because, in the case of the servant, as in that of the master, the degree of care to be exercised by him is to be measured by the particular circumstances. To illustrate, a servant, although he knows that a particular defect exists in the appliances of the business, or that a particular service is dangerous, and by using such appliances, or performing the act, he is regarded as having assumed the risks incident thereto, yet, he can only be said to have assumed such risks as are naturally incident thereto; and unless the use of the machinery or the doing of the act are *necessarily and inevitably* dangerous, he is not in law chargeable with negligence; and whether he is so in fact is a question for the jury in view of all the circumstances. Thus, where a servant was killed while making a flying switch, it was held that the question whether he was so negligent in attempting to do it, and was to be charged with having assumed the risks incident to doing it, depended upon the question whether if the master had provided proper appliances, injurious consequences would necessarily and inevitably have resulted; and the plaintiff was permitted to show, as

¹ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240.

tion as to whether he was guilty of negligence in remaining in the service under the circumstances is a question of fact for the jury.

SEC. 380. Inexperienced Employés: New Risks: Minors. — An employer is required to warn an inexperienced servant of any dangers liable to be encountered by him in the performance of the duties assigned him, except where the servant by reason of his age, etc., may be presumed competent to see and avoid the danger.¹ Where there are latent defects, or hazards incident to the business which are not usually incident to the business, of which the master knows or ought to know, it is his duty to warn the servant thereof.² Therefore, if new machinery is introduced upon the road, the use of which is specially dangerous,³ or if dangerous agencies of any kind, not usually employed in the business, are introduced, the master must point out the danger and explain the method of use.⁴ A failure on his part to do so renders him liable although the immediate cause of the injury is the negligence of a co-servant, — that is, if

bearing upon that point, that the deceased had safely performed that service before, and that others had also done so. *Greenleaf v. Ill. Central R. Co.*, 29 Iowa, 14. In this case, it was shown that the defendant had failed to provide hand-rails, platform, or other appliances on a freight-car to protect the servant while uncoupling the train, and that the deceased was aware of such defect, and it was held that a recovery would not necessarily be defeated because of such knowledge by the servant; because, when called upon to perform a service suddenly, he could not be presumed to have in mind all the defects in a particular instrumentality; and the question as to whether his act was really negligent was for the jury, taking into consideration all the circumstances attending the act, the exigencies of the service, the suddenness of the call to the particular service, etc. *Patterson v. Pittsburgh, &c. R. Co.*, 76 Penn. St. 389; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Clarke v. Holmes*, 7 H. & N. 942; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Plank v. N. Y. Central R. Co.*, 60 N. Y. 607; *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; *Flike v. Boston, &c. R. Co.*, 53 N. Y. 549; *Keegan v. Western R. Co.*, 8 id. 175.

¹ *Grizzle v. Frost*, 3 F. & F. 622; *Louis-*

ville, &c. R. Co. v. Frawley, 110 Ind. 23; 28 Am. & Eng. R. Cas. 308; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 552; *Railroad Co. v. Fort*, 17 Wall. (U. S.) 554; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Hill v. Gust*, 55 Ind. 45; *Anderson v. Morrison*, 22 Minn. 74; *O'Connor v. Adams*, 120 Mass. 427; *Favies v. Phillips*, 39 Ark. 17; 43 Am. Rep. 264. In this case, however, we can see no ground upon which the verdict should have been set aside, as the charge of the court was strictly accurate, and according to the doctrine of all the cases. In *Dowling v. Allen*, 74 Mo. 13, 41 Am. Rep. 298, in the case of a boy seventeen years old, set at work on visibly dangerous machinery, it was held that the servant was entitled to be warned by his employer of the danger.

² *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Connolly v. Paillon*, 41 Barb. (N. Y.) 369; *Baxter v. Roberts*, 44 Cal. 187; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Ardesco Oil Co. v. Gilson*, 63 Penn. St. 146.

³ *Walsh v. Peet Valve Co.*, 110 Mass. 23.

⁴ *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151.

the injury would not have occurred if the master had discharged his duty, the fact that the negligence of a co-servant was an active and immediate cause does not remove the master's liability.¹ For such negligence, the probability of it, and the consequences likely to follow it, may have been the very dangers against which the servant should have been warned.

The mere fact that a servant is a minor does not of itself render the master under any greater obligation to him than to older employées; when he enters the service he assumes all the risks incident to it, and no exception to the general rule in this regard is made in his favor.² But where he is so young that his employer is bound to know his inexperience and his inability to appreciate the dangers of his position or to protect himself from them, the master owes a special duty to instruct him as far as possible, so as to render him less liable to injury, and is liable for sending him into positions where his youth renders him incapable of proper self-protection.³

¹ *Jones v. Florence Min. Co.*, 66 Wis. 268; 57 Am. Rep. 269; *Hamilton v. Galveston, &c. R. Co.*, 54 Tex. 562. "It cannot be doubted that a service which involves obvious danger may be performed in comparative safety by one who has had adequate experience or sufficient instruction, while the same service would be attended with almost certain injury if attempted by one who had neither experience nor instruction. In such a case the employer, who, with knowledge of the want of experience of an employé, nevertheless without instruction or warning, exacts from him a service which requires the observance of extraordinary caution, or the exercise of peculiar skill, in order that an apparent danger may be avoided, may, depending on the extent of the incapacity of the employé, the nature of the service required, and all the other circumstances of the case, be liable for an injury sustained. *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298." MITCHELL, J., in *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 28; 28 Am. & Eng. R. Cas. 308. "We think it now clearly settled that if a master employs a servant to do work in a dangerous place or where the mode of doing the work is dangerous and apparent to a person of

capacity and knowledge on the subject, yet if the servant, from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers unless he first gives him such instructions or caution as will enable him to comprehend them and do his work safely with proper care on his part." *Jones v. Florence Mining Co.*, 66 Wis. 277. *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433, 441. See also *Malone v. Hawley*, 46 Cal. 409, in which the rule was correctly stated thus, where the injury arose from a defective hoisting-tackle. "The master is liable, if the method of attaching the hoisting-rope was unsafe, and the injury resulted from such defect, if the defendant *knew* or *ought to have known* of the defect, and the plaintiff had not equal means of knowledge." Mich. Cent. R. Co. v. Dolan, 32 Mich. 510; *McLaren v. Stark*, 10 Ct. of Sess. (Sc.) 31.

² *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466; *Sullivan v. India Mfg. Co.*, 118 Mass. 396; *Crilly v. Texas, &c. R. Co.* (La.), 10 So. Rep. 400; *East & West R. Co. v. Sims*, 80 Ga. 807; *Youll v. Sioux City, &c. R. Co.*, 66 Iowa, 346; 21 Am. & Eng. R. Cas. 589.

³ *Railroad Co. v. Fort*, 17 Wall. (U. S.)

The severity of the ordinary rule, it has been observed, is "measurably relaxed in favor of employés, in case the defect or danger is such as is not open to observation on ordinary inspection, or in case the employé, on account of immaturity, or for any other reason, is known to be not of sufficient capacity or experience to appreciate the danger or know how to perform the required service, and yet avoid the obvious hazard."¹ Therefore the master's liability is not removed by his giving the young employé instructions where he is incapable of comprehending them.² This duty to warn and instruct inexperienced employés is not discharged by a general warning that the service about to be entered is dangerous, or any particular thing connected with it; there must be such instruction, varying according to the capacity of the servant, as will convey to him the exact dangers to which he is about to subject himself, and the best method of avoiding them.³ Nor is this duty discharged by intrusting its performance to a third person.⁴

553; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; *Nelson v. Johansen*, 18 Neb. 180; 53 Am. Rep. 806; *Larson v. Berquist*, 34 Kan. 334; 55 Am. Rep. 249. A minor may be of sufficient discretion to justify his employment as a brakeman (*Houston, &c. R. Co. v. Miller*, 51 Tex. 274). Whether or not he is of sufficient discretion is a question for the jury. *Hamilton v. Galveston, &c. R. Co.*, 54 Tex. 562. It is an act of negligence for a railroad company to take into its employment as a brakeman a minor of such tender years as not to know the risks of the service, if the agent making the contract knows that he is a minor and that the contract is made without the consent of his parents, but not if from his statements and general appearance the agent believes that he is of age. *Goff v. Norfolk, &c. R. Co.*, 36 Fed. Rep. 300. "The employment of a boy only fifteen years old, in the hazardous position of brakeman, if without the consent of his mother and only parent, was a wrong done to the mother, and unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been by the employer, such a contract would not place him in the position of an employé, or preclude a recovery for injuries suffered from the negligence of a co-employé." *Hamilton v. Galveston,*

&c. R. Co., 54 Tex. 562. See 2 Thompson on Neg., p. 977, § 8.

¹ *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 22; 28 Am. & Eng. R. Cas. 308; *Pittsburgh, &c. R. Co. v. Adams*, 105 Ind. 151. These cases hold, however, that the "employer may assume — unless he has knowledge to the contrary — without a critical examination, that a person who seeks employment in a particular capacity is possessed of sufficient ability and experience, and is of such an age as qualifies him to discharge the duties incident to the service applied for, and that he is competent to apprehend and avoid all the apparent and obvious hazards of the service as they may appear during its progress."

² *Smith v. Car Works*, 60 Mich. 504; *Ryan v. Tarbox*, 135 Mass. 207.

³ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Jones v. Florence Min. Co.*, 66 Wis. 279; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, 295, 311. The cases which are sometimes cited as holding that notice of warning, etc., is not bound to be given, are all referable to that class in which the servant was a man of experience and therefore needed no instruction. See for example *Missouri Pac. R. Co. v. Watts*, 63 Tex. 552.

⁴ *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294. If the agent to convey the instruction is incompetent or poorly dis-

A person or corporation who knowingly hires and keeps in its employ a minor without his parents' consent, is liable to the parent for the reasonable value of the child's services.¹ Indeed, in one case the court has gone so far as to intimate that a railroad company is responsible for damages resulting from the death of a minor child employed by it without the consent of his father, even though the death was caused by the negligence of the child's fellow-servant.² But this view cannot obtain, except where the child was so young as entirely to incapacitate him from appreciating the danger to which he is being subjected. For while it may be wrongful as to the parent to employ his son, a minor, who is of the age of discretion, in a particular service against the parent's wish, yet this does not deprive the son of power to enter into a contract whereby he is to secure employment, and a contract voluntarily entered into by him creates between him and his employer the relation of servant and master, so that the latter's liability is regulated by the rules of law governing that relation.³ To uphold any other doctrine would be an unnecessary hardship on a minor desiring employment, and would serve no beneficent purpose; the safety of the minor is sufficiently secured by the rule which requires that the measure of the master's duty in such cases is increased in proportion to the incapacity of the servant.⁴

SEC. 380 a. Change of Employment: New Service.—The servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to the particular work and class of work for which he is employed, and if the master orders him to work temporarily in another department of the general business,

charges his duty, and in consequence the servant is injured, the master cannot escape by setting up that the injury was the result of the negligence of a fellow-servant; the agent in such a case is not a fellow-servant but a representative of the master. *Brennan v. Jordan*, 13 Daly (N. Y.), 208. See also *Finklestein v. New York, &c. R. Co.*, 41 Hun (N. Y.), 34. But if the warning and instruction is actually given, it is said to be of no importance that it did not come from the master or his agent. *Sullivan v. India Mfg. Co.*, 113 Mass. 396.

¹ *Grand Rapids, &c. R. Co. v. Showers*, 71 Ind. 454; *Rogers v. Smith*, 17 Ind. 323.

² *Houston, &c. R. Co. v. Miller*, 49

Tex. 322; *Hamilton v. Galveston, &c. R. Co.*, 54 Tex. 562.

³ *Texas, &c. R. Co. v. Crowder*, 61 Tex. 262; *Texas & Pac. R. Co. v. Carlton*, 60 Tex. 397; 15 Am. & Eng. R. Cas. 350.

⁴ "The duties arising from the contract, on the part of the master in reference to the care due to the minor, would vary with the character and hazard of the employment, and the intelligence and capacity of the child to comprehend and avoid any danger attendant on the service in which he is engaged." *Texas & Pac. R. Co. v. Carlton*, 60 Tex. 401. See also *Houston, &c. R. Co. v. Miller*, 51 Tex. 274; *Nashville, &c. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 620.

where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employés, he will not, in obeying such orders, necessarily assume the risks incident to the work, and the risk of injuries from the negligence on the part of such employés.¹ If, however, the servant goes into a hazardous work outside of his contract of hiring, either voluntarily or in obedience to an order from one who had right so to command him, the rule is different, for he thereby puts himself beyond the protection of the master's implied undertaking.² In one of the cases just cited, the plaintiff, a servant of the company, had been employed as a section hand, and in no other capacity. On one occasion he was ordered by his superior, P., to get on a construction-train to perform such services there as might be required of him. In the course of the journey P. further ordered him to act as brakeman on the last car, there being an insufficient force of brakemen on the train. Plaintiff was ignorant of the duties of a brakeman and of the dangers incident to them, and in trying to couple cars he was severely injured. The court held that he could not be charged with having assumed the additional risks incident to a brakeman's duty.³ It

¹ Pittsburgh, &c. R. Co. v. Adams, 105 Ind. 151; 23 Am. & Eng. R. Cas. 408. The court said (p. 166): "As we have said, when, by the order of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is that when a servant is thus, by orders of the master, put at work outside his employment, and is injured by reason of defective machinery, tracks, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in safe condition. When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in safe condition, but also that they are in a safe condition, and fit for the business for which they are used." The same principle is even more strongly upheld in Chicago, &c. R. Co. v. Bayfield, 37 Mich. 205;

Jones v. Lake Shore, &c. R. Co., 49 Mich. 573; 8 Am. & Eng. R. Cas. 221; Lalor v. Chicago, &c. R. Co., 52 Ill. 401; 4 Am. Rep. 616; Mann v. Oriental Print Works, 11 R. I. 152; Weiden v. Brush Electric Co., 73 Mich. 268; Michigan Central R. Co. v. Smithson, 45 Mich. 212; Cincinnati, &c. R. Co. v. Long, 112 Ind. 166; 31 Am. & Eng. R. Cas. 138. See also Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 558; Chicago, &c. R. Co. v. Harney, 28 Ind. 28; Anderson v. Morrison, 22 Minn. 274.

² Pittsburgh, &c. R. Co. v. Adams, 105 Ind. 151; Atlanta, &c. R. Co. v. Ray, 70 Ga. 674; 22 Am. & Eng. R. Cas. 286. But where a superior gives orders to one of his gang, the servant has a right to assume that the order was given with authority, and it is no defence to the company to say that the order was beyond the scope of the superior's authority. Chicago, &c. R. Co. v. Bayfield, 37 Mich. 210.

³ Pittsburgh, &c. R. Co. v. Adams, 105 Ind. 151; 23 Am. & Eng. R. Cas. 408.

seems that this doctrine is eminently just and reasonable, but there are many authorities which hold that the master's liability in such cases is founded solely on the assumption that the servant was ignorant of the dangers incident to his new position, and that when it appears that he was well aware of the existence and character of such dangers, he assumes the risk of them by obeying the order given him, even though a refusal to obey would have subjected him to a dismissal from the service.¹ But these authorities hold that if the servant is sent into a new branch of the service, of the dangers of which he is ignorant, the master is responsible if he fails to inform him of the risks and how to avoid them.² So also if the servant, being young and inexperienced, is incapable of appreciating the dangers attending the work assigned him outside of his regular employment, he cannot be held to have assumed the risk of them, although they might have been apparent to one of more experience.³

SEC. 381. Employment of Insufficient Number of Servants. — The term "appliances" of the business embraces not only machinery, premises, and all the implements of every kind used in and about the business, but also the persons employed to operate them; and the master must furnish a sufficient number of persons competent to perform the labor safely;⁴ and when the failure to employ a sufficient number of hands to perform the particular service is the proximate cause of the injury, the master is liable, unless the ser-

¹ *Leary v. Boston, &c. R. Co.*, 139 Mass. 580; 23 Am. & Eng. R. Cas. 388. See also *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 304; *Houston, &c. R. Co. v. Fowler*, 56 Tex. 452; 8 Am. & Eng. R. Cas. 504; *Galveston, &c. R. Co. v. Lempe*, 59 Tex. 19; 11 Am. & Eng. R. Cas. 201; *East Line, &c. R. Co. v. Scott*, 68 Tex. 694 (in this case there was proof of a custom for employés to work in any branch of the service where they were needed).

² *O'Connor v. Adams*, 120 Mass. 427. The change of a brakeman from a freight train to a passenger train does not render the master liable, since the duties of the two positions are practically the same, and the new one is, if anything, less hazardous. See *Adkins v. Atlanta, &c. R. Co.*, 27 S. C. 74.

³ In the case of *Railroad Co. v. Fort*, 17 Wall. U. S.) 558, F., a boy of tender years, had been engaged to work in

a machine-shop, under the superintendence of one C., whose orders he was required to obey. His duty was to put away mouldings as they came from the moulding-machine. Some months after he had entered their employment, by C.'s order he ascended the ladder to a great height from the floor, among rapidly revolving and dangerous machinery, in order to adjust a belt. While doing this his arm was caught in a wheel and torn off. The jury having found that the order was within the authority conferred on C., and that it was an unreasonable one, that its execution was attended with great danger, the court held that the company must answer in damages for the loss of the child's limb.

⁴ *Flike v. Boston, &c. R. Co.*, 53 N. Y. 549; *Hayes v. Western R. Co.*, 5 Cush. (Mass.) 270; *Mad River R. Co. v. Barber*, 5 Ohio St. 78; *Skipp v. Eastern Counties Ry. Co.*, 9 Exch. 223.

vant may fairly be said to have assumed the risk incident thereto.¹ Consequently, if a railway company sends out a train insufficiently equipped with brakemen or other hands, it is liable to its employes for any injury resulting therefrom.²

SEC. 382. Duty of Company to establish Rules.—It is the duty of any person or corporation engaged in a complex business to establish and enforce definite regulations for the protection of his employes; and a failure to adopt such rules, as well as laxity in their enforcement, is regarded as negligence.³ Thus, it is the duty of a railway company to fix the time for the arrival and departure of trains; and if it sends out other trains, without notice to the employes likely to be affected thereby, it is liable to them for resulting injuries.⁴ But where an employe knows that no suitable regulations have been adopted, or that a custom to violate them has grown up, by remaining in the service, he is regarded as waiving the defect, and assuming the risk incident thereto.⁵ If proper regulations have been established by the company, it is relieved from liability for injuries resulting from a violation of the rules by an employe, when the injury is the direct or proximate result of such violation, but not otherwise.⁶ Thus, a brakeman has no right of action against the company for injuries sustained while acting in wilful disobedience of a rule of the company prohibiting flying-switches.⁷ But a servant may show that certain rules are habitually

¹ *Mad River R. Co. v. Barber*, 5 Ohio St. 78.

² *Flike v. Boston, &c. R. Co.*, 53 N. Y. 549.

³ *Vose v. Lancashire Ry. Co.*, 2 H. & N. 728; *Haynes v. East Tenn. R. Co.*, 3 Coldw. (Tenn.) 222; *Abel v. President, &c.*, 103 N. Y. 581; 28 Am. & Eng. R. Cas. 497; *Sheehan v. New York, &c. R. Co.*, 91 N. Y. 332; 12 Am. & Eng. R. Cas. 235; *Lake Shore, &c. R. Co. v. Lavalley*, 36 Ohio St. 221; 5 Am. & Eng. R. Cas. 549; *Regan v. St. Louis, &c. R. Co.*, 93 Mo. 348.

⁴ *Haynes v. East Tenn. R. Co.*, 3 Coldw. (Tenn.) 222.

⁵ *Haskins v. Railroad Co.*, 65 Barb. (N. Y.) 261; *Kroy v. Chicago, &c. R. Co.*, 32 Iowa, 357; *Chicago, &c. R. Co. v. Taylor*, 69 Ill. 461. Where a rule of the company requires a watchman to be stationed in order to warn employes at work

under a car while on the track, and the rule is usually obeyed, such employes have a right to presume that it has been complied with. *Luebke v. Chicago, &c. R. Co.*, 59 Wis. 127; 15 Am. & Eng. R. Cas. 183.

⁶ *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Sprang v. N. Y. Central R. Co.*, 58 N. Y. 56; *Thomas v. Memphis, &c. R. Co.*, 51 Miss. 637; *Gulf, &c. R. Co. v. Ryan*, 69 Tex. 665; 33 Am. & Eng. R. Cas. 289; *Gardner v. Michigan, &c. R. Co.*, 58 Mich. 584; 24 Am. & Eng. R. Cas. 435; *Wolsey v. Lake Shore, &c. R. Co.*, 33 Am. & Eng. R. Cas. 227; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Haskin v. New York, &c. R. Co.*, 65 Barb. (N. Y.) 129.

⁷ *Pilkington v. Gulf, &c. R. Co.*, 70 Tex. 226. See *Alexander v. Louisville, &c. R. Co.*, 83 Ky. 589; 25 Am. & Eng. R. Cas. 458.

violated by all the employé¹ with the knowledge of the company,² or that a disobedience of the rules was necessary in order to accomplish the work assigned him.³ In a case in New York,⁴ the plaintiff's intestate, a brakeman upon the defendant's railway, was killed while riding upon the engine of the train with which he was connected, by its being run into by another train. The printed rules of the company provided that no brakeman should be permitted to leave his post or be in a car when the train was moving, and the conductor was required to see that the rule was enforced. The rules did not define the posts of brakemen, and no evidence on that subject was given. Printed copies of the rules were furnished to the engineers and conductors, but not to brakemen. It did not appear that the rules had ever been seen by Sprang, or that he knew their contents. Evidence was offered on the part of plaintiff and admitted, under exception, to show that brakemen frequently rode on the engines of defendant, and that it was the usual custom of the head-brakeman; and that this had been done with the knowledge of the agents of the defendant, among others the head-conductor, or dispatcher of freight trains, and the assistant-superintendent. It was held by the court that the non-observance by the deceased of rules of which it did not appear that he had notice was not a violation of duty; that it could not be assumed without evidence that his duty required him to be at all times at the brake, or at any particular place upon the train, or that to be upon the engine in accordance with a custom acquiesced in by his superiors was a

¹ See note 7, p. 1759.

² Northern Pac. R. Co. v. Nickels, 50 Fed. Rep. 718; 1 C. C. A. 625; Fray v. Minneapolis, &c. R. Co., 30 Minn. 234; Hayes v. Bush, &c. Mfg. Co., 41 Hun (N. Y.), 407.

³ Thus, the violation by a conductor of a rule of the company forbidding a "running switch" does not preclude him from recovering against the company for an injury received in making such a switch, it appearing this was the only practicable way of putting the cars on the switch desired, and that it had been so habitually resorted to as to raise the presumption that the company was aware of and approved it. Alexander v. Louisville, &c. R. Co., 83 Ky. 590; 25 Am. & Eng. R. Cas. 458. So, a brakeman is not guilty of negligence in going between the cars to make a coupling, although the company's rules

forbade him to do so, where it was not possible to make the coupling otherwise. Memphis, &c. R. Co. v. Graham, 94 Ala. 545. Though plaintiff was directed by the yard-master not to go between the cars, yet his going there to uncouple them would not make him guilty of negligence when there was no rule of the company forbidding it, and he was acting under the direction of the conductor who directed him to do so. Hannah v. Connecticut River R. Co., 154 Mass. 529. A fireman cannot be considered negligent because he does not endeavor to enforce upon the engineer obedience to the regulations of the road. New Jersey, &c. R. Co. v. Young, 49 Fed. Rep. 723; 1 C. C. A. 428.

⁴ Sprang v. N. Y. Central R. Co., 58 N. Y. 56.

violation thereof; and that the evidence was sufficient to authorize the submission to the jury of the question whether deceased was rightfully upon the engine when the accident happened, and to sustain a finding thereon in favor of plaintiff.

It has been said that the burden rests upon the company to show that the employé knew of the existence and requirements of a particular rule.¹ But if these rules have been posted in conspicuous places frequented by the employés, the presumption arises that their existence was known, and this can only be overcome by clear and positive proof.²

¹ See *Sprang v. N. Y. Central R. Co.*, 58 N. Y. 56. Where it is not shown, either conclusively or presumptively, that the deceased employé had knowledge of certain rules, there is no error in excluding evidence of them. *Atchison, &c. R. Co. v. Plunkett*, 25 Kan. 188; 2 Am. & Eng. R. Cas. 127. And a plea which sets up the violation of a rule as contributory negligence is demurrable if it fails to aver a knowledge of the regulation. *Memphis, &c. R. Co. v. Graham*, 94 Ala. 545. See also *Mackey v. Baltimore, &c. R. Co.*, 19 D. C. 282. The master is not exempt from liability by mere reason of the fact that the servant was at the time of the accident leaving his work without lawful excuse. Thus, in *Marshall v. Stewart*, 33 Eng. Law & Eq. 1, the plaintiff, a miner employed to work in the mine of B., went down, as usual, to his day's work, but he and the other miners, after working a short time, held a meeting amongst themselves to discuss certain supposed grievances, and they resolved, before working further, to come up from the pit at twelve o'clock, the usual hour for their coming up being five o'clock, and go in a body to represent their grievances to B.'s manager. While so coming up, A. was killed by a stone which fell from the top of the shaft, the planking there being in an unsafe state. A.'s representatives brought an action of damages against B., and the judge told the jury that B. was not responsible for the accident, in A. was at the time leaving his work without proper cause and for a purpose of his own. The jury found that A. was leaving his work without proper cause, but that he was killed owing to the unsafe state of the planking at the mouth of the pit. It was

held that the ruling of the judge was wrong, and that, whether A. had just cause for leaving his work or not, and was coming up for a cause of his own, still B. was responsible, being bound to take A. up just as safely as he let him down; and it makes not the slightest difference that, at the time of the accident, the servant was leaving his work without lawful excuse or proper cause. See, similar in facts and principle, *Brydon v. Stewart*, 2 Macq. H. L. 30.

In the case of *Kroy v. Chicago, &c. R. Co.*, 32 Iowa, 457, the plaintiff's intestate was aware of a custom to which he had contributed himself, to uncouple cars while in motion. It was held that no recovery could be had for injuries inflicted in the discharge of such a duty, because he must thereby be regarded as having assumed the risk incident to such customary, although extra-hazardous, service. In *Thomas v. Memphis, R. Co.*, 51 Miss. 637, the plaintiff (Thompson) was an engineer on the defendant's railroad. A rule of the company known to the plaintiff prohibited the running of trains at a greater rate of speed than seven miles an hour when approaching for the purpose of running on to a switch. On the occasion when the injury was received, the plaintiff was running his train at the rate of ten miles an hour, and the jury found that this contributed to the injury. The court held that however defective the track or other implements of the road might be, the defendant by violating the rule having contributed to the injury, no recovery could be had.

² *Lacroix v. New York, &c. R. Co.*, 132 N. Y. 570; *Pilkinton v. Gulf, &c. R. Co.*, 70 Tex. 226; *Baltimore, &c. R. Co. v. Kean*, 65 Md. 394; 28 Am. & Eng. R. Cas. 580.

SEC. 383. Using Machinery Improperly, or for Improper Purpose.

— Where a servant uses machinery or appliances for a purpose for which they were not intended by the master, no recovery can be had for injuries resulting therefrom, however defective such appliances may be; for, in the language of HOAR, J.,¹ "It is their own fault or folly if harm comes to them." Thus, if a servant, directed to carry materials from one part of a building to another in baskets, should perform the service by using a defective elevator,² or if a servant who has been provided with proper and safe appliances should neglect to use them, the master cannot be made to respond in damages, for they result from his own fault and folly;³ or if the machinery is defective, and the injury results from the failure of a fellow-servant to obey instructions as to the method of using the machine, and the injury would not have resulted except for such neglect, the master is not answerable.⁴ So when an injury arises from the servant's disobedience of a positive order of the master, and such disobedience is the promoting cause of the injury, no recovery can be had.⁵

SEC. 384. Master's Exemption extends only to Time of Actual Service. — The master is only exempted from liability when the servant is actually engaged in the service. If his time is his own when the injury occurs, and he is not at fault, he is entitled to recover in a case where any stranger could recover.⁶ When the servant's day's work is ended and he has left his place of work, the

¹ *Felch v. Allen*, 98 Mass. 573; *Durgin v. Munson*, 9 Allen (Mass.), 396.

² *Felch v. Allen*, *ante*.

³ *Griffiths v. Gidlow*, 3 H. & N. 648.

⁴ *Durgin v. Munson*, 9 Allen (Mass.), 396; 85 Am. Dec. 770.

⁵ *Frazer v. Younger*, 5 Ct. of Sess. (Sc.) (3d series) 861.

⁶ *Washburn v. Nashville, &c. R. Co.*, 3 Head (Tenn.), 638. The plaintiff, who was in the defendant's employ, was absent from his work without leave, and was riding upon another train. He was an engineer upon the road, and owing to a break upon the road his engine was lying idle, and he got upon the train in question and was riding free in the baggage-car when, owing to the gross negligence of the superintendent, a collision occurred, and the plaintiff was injured. The court held when the servant's day's work has ceased and he has left the shop or place where he is employed,

he stands in the same relation as any citizen, and the same rule of liability attaches for injuries received by him, even though through the acts of fellow-servants. The relation of fellow-servants only exists during the period when each is subject to the control of the master, and does not apply when the day's work is over. *Baird v. Pettit*, 70 Penn. St. 477. If the servant, at the time when the injury is received, is not subject to the master's control, as, if he is off service at the time, he stands in the same relation to the master as any stranger does, and the same rule of liability attaches in his favor as exists in favor of any stranger, — as, if a servant at such a time is injured by the negligent operation of a train upon which he is riding, or otherwise, he being free from fault. *ALDERSON, B.*, in *Hutchinson v. Railway Co.*, 5 Exch. 353.

relation of master and servant ceases for the time being, and he stands to the master in the same relation as any other citizen;¹ and whether the relation in fact existed when the injury was received is a question for the jury.² In this case the plaintiff was employed to assist in loading a boat, and worked about two hours and a half, when his labor was completed, and he was told to go to the office on the boat and get his pay. He was paid, and while leaving the boat the boat-hands pulled the plank in before he got ashore, whereby he was thrown against the dock and so injured that he died from the effects thereof. The question as to whether the relation of master and servant had ceased when the injury was inflicted was left to the jury, and the Supreme Court held that there was no error in that respect. DAVIS, J., in a very able opinion, said: "It is said that it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened. We do not think so." It will be observed that this case differs in its features from any of the other cases referred to, because in this case the servant had entirely completed his term of service, and had been paid off; while in the English case cited,³ and all the other cases in which this question has been discussed, the *time* of service was not ended, and the relation at best could only technically be said to be ended. In this case, it would seem that if the court was to be called upon to decide the question as a matter of law, it would, upon principle, be compelled to hold that the relation had ceased; as all control or right of control over him, as well as all duties as a master towards him ceased when he was paid off, and from that time until he left the boat he stood in the same relation to the master as any other person who was upon the boat by his invitation;⁴ nor does it extend to prevent a recovery for injuries received by members of the servant's family, as his wife.⁵

SEC. 385. Receiver of Railway liable as Master. — A receiver operating a railroad is answerable in his official capacity for an injury resulting from his personal negligence, defective machinery, or negligence of co-servants, in all cases where the railroad company itself,

¹ Baird v. Pettit, 70 Penn. St. 477.

⁴ Tunney v. Midland Railway Co., L.

² Packet Co. v. McCue, 17 Wall. (U.S.) R. 1 C. P. 86.

508.

⁵ Gannon v. Housatonic R. Co., 112

³ Tunney v. Midland Ry. Co., L. R. 1 Mass. 234; 17 Am. Rep. 82.

C. P. 86.

if operating the road, would be liable. He acquires no immunity therefrom by reason of his being an officer of the court.¹ But the receiver is not personally liable. He can only be held to the extent of the property in his hands with which to respond to judgments.²

SEC. 386. What the Servant must establish.—The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions:—

1. That the appliance was defective.

2. That the master had notice thereof, or knowledge, or *ought* to have had.

3. That the servant did not *know* of the defect, and had not equal means of knowing with the master.³

If the injury results from the direct act or neglect of the master, he is liable to his servant, the same as he would be to any person,⁴ as, where the servant is in the employ of a contractor, and an injury results from the neglect of some duty on the part of the contractee,⁵

¹ *Blumenthal v. Brainerd*, 38 Vt. 402; *Sprague v. Smith*, 29 id. 421; *Meara v. Holbrook et al.*, 20 Ohio St. 137; 5 Am. Rep. 633; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Ohrby v. Ryde Comm'rs*, 5 B. & S. 743; *Whitehouse v. Fellows*, 10 C. B. N. s. 765; *Ruck v. Williams*, 3 H. & N. 308; *Paige v. Smith*, 99 Mass. 395.

² *Mersey Docks Co. v. Gibbs*, 11 H. L. Cas. 686; *Ruck v. Williams*, 3 H. & N. 308; *Meara v. Holbrook et al.*, 20 Ohio St. 137; 5 Am. Rep. 633. A receiver is not personally liable for the torts of his employés; it is only when he commits the wrong himself that he is personally liable. Were he so liable few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceeding against him as receiver for the wrongs of his employés is in the nature of a proceeding *in rem*, and renders the property in his hands as such liable for compensation for such injuries. *Meara v. Holbrook*, 20 Ohio St. 137; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jordan v. Wells*, 3 Woods (U. S.), 527; *Kennedy v. Indianapolis, &c. R. Co.*, 11 Cent. Law Jour. 89. The railroad company is not liable for the injuries complained of in the bill for the reason that they were committed while it was out of possession of the property and had no control over it. This conclusion is

sustained by principle and authority. *Ohio, &c. R. Co. v. Davis*, 23 Ind. 560; *Bell v. Indianapolis, &c. R. Co.*, 53 id. 57; *Metz v. Buffalo, &c. R. Co.*, 58 N. Y. 61; *Rogers v. Mobile, &c. R. Co.*, 17 Cent. L. Jour. 290; *Meara v. Holbrook*, 20 Ohio St. 157; *Davis v. Duncan*, 19 Fed. Rep. —.

³ *Malone v. Hawley*, 46 Cal. 409; *Baxter v. Roberts*, 44 id. 187; 13 Am. Rep. 160; *Sizer v. Syracuse R. Co.*, 7 Lans. (N. Y.) 67; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Haskin v. Railroad Co.*, 65 Barb. (N. Y.) 129; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151. In *Davies v. England*, 10 Jurist. n. s. 1235, the plaintiff was employed to cut up the carcasses of cattle. He did not know, but the defendants did, that he would expose himself to danger on account of the diseased meat, and he was injured from that cause. It was held that the defendants were bound to warn him of the danger, and, having failed to do so, were liable for the consequences. See the text quoted with approval in *Norfolk, &c. R. Co. v. Jackson*, 85 Va. 492.

⁴ *Perry v. Ricketts*, 55 Ill. 234; *Horner v. Nicholson*, 56 Mo. 220; *Sizer v. Syracuse R. Co.*, 7 Lans. (N. Y.) 67; *Johnson v. Bruner*, 61 Penn. St. 58.

⁵ *Coughtry v. Glove Woollen Co.*, 56 N. Y. 124.

or from his personal interference with the work.¹ But in order to entitle him to a recovery, he must show that he himself was in the exercise of due care, and that the injury resulted in spite of such care on his part.²

SEC. 387. **How Master may relieve himself from Liability.** — The company is exonerated from all liability by providing proper equipments and appliances, and exercising ordinary care to keep its road and machinery in safe and proper order, and by giving the servant express notice of the risks incident to the service, and withholding any assurance that the risks will be lessened.³ For when the servant has notice of the risk he cannot recover, except upon proof of the company's breach of duty.⁴ But in the latter case, if the defects or risks are increased without the knowledge of the servant, — as, if the master negligently omits to make repairs that become necessary *after* the servant enters upon the service, and the injury falls within a class not embraced in or covered by the notice or warning, — the master may be held chargeable therefor; as the servant can only be regarded as having assumed those risks of which he had knowledge, or as a reasonable man ought to have known. The rule was aptly expressed by COCKBURN, C. J.,⁵ thus: "Where a servant is employed upon machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur."

Contracts by which a master stipulates that he shall be exempt from all liability for injuries sustained by the servant are utterly void, in so far as they relate to injuries resulting from the master's

¹ In *Horner v. Nicholson*, 56 Mo. 220, the defendant, a builder, by reason of his unskilful or negligent arrangement of the work of altering the wall of an old building, was held chargeable to the servant of a contractor engaged upon the work, for injuries resulting to him while pursuing the work according to the defendant's plans.

² *Owen v. N. Y. Central R. Co.*, 1 Lans. (N. Y.) 108. The plaintiff was injured while in the discharge of his duties as brakeman, upon the top of a freight-car, by coming in collision with the top of a bridge. It appeared that he knew of the bridge, and might have avoided the injury by stooping a little. It was held that he

could not recover. *Gibson v. Erie R. Co.*, 68 N. Y. 449.

³ *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Frazier v. Pennsylvania R. Co.*, 38 Penn. St. 104; *Mad River R. Co. v. Barber*, 5 Ohio St. 541; *Senior v. Ward*, 1 El. & El. 385; 102 E. C. L. 385; *Loonam v. Brockway*, 28 How. Pr. (N. Y.) 472.

⁴ *Central R. Co. v. Grant*, 46 Ga. 417; *Meara v. Holbrook*, 29 Ohio St. 137; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Pittsburgh, &c. R. Co. v. Devinney*, 17 Ohio St. 197; *Honner v. Ill. Central R. Co.*, 15 Ill. 550; *Chicago, &c. R. Co. v. Murphy*, 53 Ill. 339; *Farwell v. Boston, &c. R. Co.*, 4 Met. (Mass.) 49.

⁵ *Clark v. Holmes*, 7 H. & N. 944.

negligence,¹ and since he is liable in any event only for injuries resulting from his negligence, such contracts are practically ineffectual for any purpose. The policy of the law is always opposed to contracts by which railroad or other companies seek to exempt themselves from liability for the consequence of their negligence, and while such contracts are upheld in one or two jurisdictions, they are opposed to all principle and the great weight of authority.²

Compromises made by the company with the injured employé, whereby the latter, in consideration of a certain sum, agrees to release the company from all liability to him, may be upheld where they are perfectly free from fraud or deceit. But the courts always scrutinize such agreements very closely, and if the amount of the consideration, or the general character of the transaction, indicate anything approaching imposition or fraud, it will be set aside.³ As a matter of

¹ *Lake Shore, R. Co. (sub nom. Railway Co.) v. Spangler*, 44 Ohio St. 471; 58 Am. Rep. 833; 28 Am. & Eng. R. Cas. 319; *Little Rock, &c. R. Co. v. Eubanks*, 48 Ark. 460; *Kansas, &c. R. Co. v. Peary*, 29 Kan. 169; 44 Am. Rep. 630; 11 Am. & Eng. R. Cas. 260; *Willis v. Grand Trunk R. Co.*, 62 Me. 488; *Roesner v. Hermann*, 10 Biss. (U. S.) 486; 8 Fed. Rep. 782. Nevertheless such contracts have been upheld in Georgia except as to injuries resulting from the "criminal neglect" of the company. *Western, &c. R. Co. v. Bishop*, 50 Ga. 465; *Western, &c. R. Co. v. Strong*, 52 Ga. 461; *Galloway v. Western, &c. R. Co.*, 57 Ga. 512. It does not appear that there is any force in the reasoning adopted in these cases in upholding such a contract, and it may be questioned whether they will be followed. Still it must be conceded that the ruling of the Georgia Court has the apparent support of the court of the Queen's Bench. See *Griffiths v. Earl of Dudley*, 9 Q. B. D. 363. And in the case of *Western, &c. R. Co. v. Bishop*, 50 Ga. 465, *McCoy, J.*, speaking for the court, was careful to say: "We do not say that the employer and employé may make any contract. We simply insist that they stand on the same footing as other people. No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers, and doctors, of buyers and sellers, and bailors

and bailees, as of employers and employées." But no proposition is better supported than that no person or corporation can contract in advance that he or it shall not be liable for the consequences of his own wrong-doing.

In the case of *Lake Shore, &c. R. Co. v. Spangler*, 44 Ohio St. 471; 28 Am. & Eng. R. Cas. 321, the contention of the company was that "a rule [or contract] absolving the company from liability to the brakemen for the negligence of the conductor may operate to constitute the brakemen a sort of police, may induce them to be more watchful, and report to their superiors the delinquencies of the conductor, and if they are unwilling to do this, they, and not the company, should suffer the consequences. A rule of this kind is calculated, also, to better protect the public against injuries to merchandise in course of transportation, by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains." But the court considered that such a view was not tenable, and held the company liable notwithstanding the contract of exemption.

² *Lake Shore, &c. R. Co. v. Spangler*, 44 Ohio St. 471; 58 Am. Rep. 833; 28 Am. & Eng. R. Cas. 319; *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357. See *ante*, § 365; *post*, §§ 406, 425.

³ *Ill. Central R. Co. v. Welch*, 52 Ill. 183; *Chicago, &c. R. Co. v. Doyle*, 18

course, however, the employé cannot ask to have the compromise set aside when he has squandered the consideration paid him and is unable or refuses to return it.¹

Kan. 58; *Wallace v. Chicago, &c. R. Co.*, benefit of employés — release of company's
67 Iowa, 547; *Schultz v. Chicago, &c. R.* liability in consideration therefor).
Co., 44 Wis. 638. See also *O'Neil v. Lake* ¹ *Stewart v. Houston, &c. R. Co.*, 62
Superior Iron Co., 63 Mich. 690 (fund for Tex. 246.

CHAPTER XXIV.

FELLOW-SERVANTS.

SEC. 388. Fellow-servants, who are.

389. Duty of Master as to Selection of Servants.

390. Master does not warrant Servants' Competency.

391. Degree of Care required of the Master.

392. Law presumes the Master has performed his Duty.

393. Negligence in Hiring or Retaining must be proved.

394. When Master is affected with Notice of Incompetency.

395. Rule when Servant knows of Co-servant's Incompetency.

SEC. 396. Incompetency of the Servant, and Negligence of the Master must be Shown.

397. Difference in Grade or Class of Service does not affect the Matter.

398. Where Machinery is Defective, but Promoting Cause of Injury is Negligence of Co-servant.

399. Status of Persons Volunteering Assistance.

399a. Where Offending Servant represents the Master.

SEC. 388. Fellow-servants, who are.—The true test of fellow-service is community in that which is the test of service,—which is, *subjection to control and direction by the same common master in the same common pursuit*.¹ If servants are employed and paid by the

¹ *Sadler v. Henlock*, 4 E. & B. 576; *Abrahams v. Reynolds*, 5 H. & N. 140; *Murphy v. Caralli*, 3 H. & C. 462; *Coulter v. Board of Education*, 4 Hun (N. Y.), 469; *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Brickner v. N. Y. Central R. R. Co.*, 49 N. Y. 672; *Coon v. Syracuse, &c. R. R. Co.*, 5 N. Y. 492; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Wonder v. Baltimore, &c. R. R. Co.*, 32 Md. 411; *Columbus, &c. R. R. Co. v. Arnold*, 31 Ind. 174; *Blake v. Maine Central R. R. Co.*, 70 Me. 60; *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; *Charles v. Taylor*, L. R. 3 C. P. Div. 492; *Lovell v. Howell*, L. R. 1 C. P. Div. 161; *Yoger v. Atlantic, &c. R. R. Co.*, 4 Hughes (U. S. C. C.), 192; *Graville v. Minneapolis, &c. R. R. Co.*, 3 McCrary (U. S. C. C.), 352; *Buckley v. Gould*, 14 Fed. Rep. 833; *McDermott v. Boston*, 133 Mass. 849; *Flynn v. Salem*, 134 Mass. 351; *McDon-*

ald v. Eagle, &c. Mfg. Co., 67 Ga. 761; 68 id. 839; *Chicago, &c. R. R. Co. v. Doyle*, 60 Miss. 977; *Hoke v. St. Louis, &c. R. R. Co.*, 11 Mo. App. 574; *Nashville, &c. R. R. Co. v. Wheless*, 10 Lea (Tenn.), 741; *Helfrich v. Williams*, 84 Ind. 553; *Collins v. St. Paul, &c. R. R. Co.*, 30 Minn. 31; *Hath v. Peters*, 55 Wis. 405; *Dwyer v. Am. Express Co.*, 55 Wis. 453; *Greenwood v. Marquette, &c. R. R. Co.*, 49 Mich. 197; *Chicago, &c. R. R. Co. v. Simmons*, 11 Ill. App. 147; *Chicago, &c. R. R. Co. v. Bragonier*, 11 Ill. App. 516; *Pittsburgh, &c. R. R. Co. v. Ranney*, 37 Ohio St. 665; *Robertson v. Terre Haute, &c. R. R. Co.*, 78 Ind. 77; 41 Am. Rep. 552; *Howland v. Milwaukee, &c. R. R. Co.*, 54 Wis. 226; *Brown v. Winona, &c. R. R. Co.*, 27 Minn. 162; 38 Am. Rep. 285; *Smith v. Potter*, 46 Mich. 258; 41 Am. Rep. 161; *Stringham v. Stewart*, 27 Hun (N. Y.), 562; *Marven v. Muller*, 25

same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common pursuit; and being subject to the same control, they are fellow-servants within the rule as adopted in most of the cases in this country and in England; and each, by entering the service, is regarded as assuming the risks incident to the negligence of the other.¹ "In order to constitute fellow-laborers," said Lord CRAN-

Hun (N. Y.), 163; *Harvey v. N. Y. Central R. R. Co.*, 88 N. Y. 481; *Murphy v. Boston, &c. R. R. Co.*, 88 N. Y. 146; 42 Am. Rep. 240; *Slater v. Jewett*, 85 N. Y. 61; 39 Am. Rep. 627; *McCasker v. Long Island R. R. Co.*, 84 N. Y. 77; *Walker v. Boston, &c. R. R. Co.*, 128 Mass. 8; *Kelly v. Boston Lead Co.*, 128 Mass. 456; *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521; *Gibson v. Northern Central R. R. Co.*, 22 Hun (N. Y.), 289; *Dana v. N. Y. Central R. R. Co.*, 23 Hun (N. Y.), 473; *Cowles v. Richmond, &c. R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 309; 37 Am. Rep. 620; *Peterson v. Whitebreast, &c. Coal Co.*, 50 Iowa, 673; *Chicago, &c. R. R. Co. v. Scheuring*, 4 Ill. App. 533; *McAndrews v. Burns*, 39 N. J. L. 117; *Mullan v. Phila., &c. S. S. Co.*, 78 Penn. St. 25; *Manville v. Cleveland, &c. R. R. Co.*, 11 Ohio St. 417; *Chicago, &c. R. R. Co. v. Murphy*, 53 Ill. 336; *Valtez v. Ohio, &c. R. R. Co.*, 85 Ill. 500; *Cumberland, &c. R. R. Co. v. State*, 44 Md. 283; *Chicago, &c. R. R. Co. v. Moranda*, 93 Ill. 302; *Swainson v. North Eastern Ry. Co.*, L. R. 3 Exchq. Div. 341; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Baldt v. N. Y. Central R. R. Co.*, 18 N. Y. 432; *McGowan v. St. Louis, &c. R. R. Co.*, 61 Mo. 528; *Besel v. N. Y. Central R. R. Co.*, 70 N. Y. 171; *Whaalan v. Mad River &c. R. R. Co.*, 8 Ohio St. 249; *Hanrathy v. Northern Central R. R. Co.*, 46 Md. 280; *Weger v. Penn. R. R. Co.*, 55 Penn. St. 460; *Wilson v. Madison, &c. R. R. Co.*, 18 Ind. 226; *Sammon v. N. Y. & Harlem R. R. Co.*, 62 N. Y. 251; *Illinois Central R. R. Co. v. Keen*, 72 Ill. 512; *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; *Sherman v. Rochester, &c. R. R. Co.*, 17 N. Y. 153; *Pittsburgh, &c. R. R. Co. v. Lewis*, 33 Ohio St. 196; *Ragsdale v.*

Memphis, &c. R. R. Co., 3 Baxt. (Tenn.) 426; *Mobile, &c. R. R. Co. v. Smith*, 59 Ala. 545; *Finney v. Boston, &c. R. R. Co.*, 52 N. Y. 632; *Slattery v. Toledo, &c. R. R. Co.*, 23 Ind. 81; *Hoffnagle v. N. Y. Central, &c. R. R. Co.*, 53 N. Y. 608; *Foster v. Minnesota, &c. R. R. Co.*, 14 Minn. 360; *O'Connell v. Baltimore, &c. R. R. Co.*, 20 Md. 212; *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; *Rose v. Boston, &c. R. R. Co.*, 58 N. Y. 217; *Drymala v. Thompson*, 26 Minn. 40; *Chicago, &c. R. R. Co. v. Rush*, 84 Ill. 570; *Cooper v. Milwaukee, &c. R. R. Co.*, 23 Wis. 638; *Zeigler v. Day*, 123 Mass. 152; *Gallagher v. Piper*, 16 C. B. (N. S.) 669. But in Illinois this test of fellow-service is not adopted, and the question is made to depend upon the circumstance whether they are engaged in the same department of service. *Helton v. Daly*, 4 Ill. App. 25. In *Chicago, &c. R. R. Co. v. Moranda*, 93 Ill. 302, a track-repairer and a fireman on the train were held not to be fellow-servants. See also *Ryan v. Chicago, &c. R. R. Co.*, 60 Ill. 171; *Chicago, &c. R. R. Co. v. Bliss*, 6 Brad. (Ill.) 411; *Toledo, &c. R. R. Co. v. O'Connor*, 77 Ill. 391.

¹ *Randall v. Baltimore, &c. R. Co.*, 109 U. S. 478; *Farwell v. Boston, &c. R. Co.*, 4 Met. (Mass.) 49; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Coon v. Syracuse, &c. R. Co.*, 5 N. Y. 492; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562; *Besel v. N. Y. Central R. Co.*, 70 N. Y. 171; *Slater v. Jewett*, 85 N. Y. 61; *McAndrews v. Burns*, 39 N. J. L. 117; *Smith v. Oxford Iron Co.*, 42 id. 467; *Lehigh Valley Coal Co. v. Jones*, 86 Penn. St. 432; *Whaalan v. Mad River R. Co.*, 8 Ohio St. 249; *Pittsburgh, &c. R. Co. v. De-*

WORTH,¹ “. . . it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same, or even in *similar* acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engineman and the switcher, the man who lets the miners down into, and who afterwards brings them up from the mine, and the miners themselves,—all these are fellow-laborers or *collaborateurs* within the meaning of the term.” But there must be a unity of the two elements, namely, *of control, and of common pursuit*;² and unless the servants are subject to the same general control, the fact that they are engaged in the same common pursuit does not render them co-servants. Thus, if A. and B. each have separate and distinct contracts for building separate portions of a railroad-track, the servants of both are engaged in the same common pursuit, and are laboring to accomplish the same end, but they are not co-servants within the rule, *because they are not subject to the same control*.³ So if A. is the

vinney, 17 id. 197; *Slattery v. Toledo, &c. R. R. Co.*, 23 Ind. 81; *Smith v. Potter*, 46 Mich. 258; *Moseley v. Chamberlain*, 18 Wis. 730; *Cooper v. Milwaukee, &c. R. R. Co.*, 23 id. 668; *Sullivan v. Mississippi, &c. R. R. Co.*, 11 Iowa, 421; *Peterson v. Whitebreast Coal Co.*, 50 id. 673; *Foster v. Mississippi Central R. R. Co.*, 14 Minn. 277; *Ponton v. Wilmington & Weldon R. R. Co.*, 6 Jones (N. C.), 245; *Louisville R. R. Co. v. Robinson*, 4 Bush, 507; *Mobile & Montgomery R. R. Co. v. Smith*, 59 Ala. 245; *Hogan v. Central Pacific R. R. Co.*, 49 Cal. 128; *Kielley v. Belcher Mining Co.*, 3 Sawy. 500; *Hutchinson v. York, New Castle, & Berwick Ry. Co.*, 5 Exch. 343; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, 3 id. 300; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Morgan v. Vale of Neath Ry. Co.*, 5 B. & S. 570, 736; L. R. 1 Q. B. 149; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Charles v. Taylor*, 3 C. P. D. 492; *Conway v. Belfast & Northern Counties Ry. Co.*, Ir. R. 9 C. L. 498, and Ir. R. 11 C. L. 345.

¹ In *Bartonshill Coal Co. v. Reid*, 3 Macq. 295.

² *Wylie v. The Caledonian Railroad Co.*, 9 Ct. of Sessions (Sc.) (3d series);

Svenson v. Atlantic S. S. Co., 57 N. Y. 108; *Abrahams v. Reynolds*, 5 H. & N. 142; *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. The White Moss Colliery Co.*, L. R. 1 C. P. D. 556; *Chicago R. R. Co. v. Murphy*, 53 Ill. 336; *Dalyell v. Tyner*, El., Bl., & El. 899; *Charles v. Taylor*, L. R. 3 C. P. Div. 492; *Lovell v. Hawk*, L. R. 1 C. P. Div. 161; *Tunney v. Midland Ry. Co.*, 1 C. P. 296; *Seaver v. Boston & Maine R. R. Co.*, 14 Gray (Mass.), 467. Nor is this rule altered by the fact that the servant guilty of such negligence is a servant of superior authority, whose lawful directions the other is bound to obey. *Feltham v. England*, L. R. 2 Q. B. 33; *McAndrews v. Burns*, 39 N. J. L. 117; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 467; *Colton v. Richards*, 123 Mass. 484; *Cummings v. Grand Trunk R. R. Co.*, 4 Cliff. (U. S. C. C.) 181. See also *Harper v. Ind. & St. Louis R. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. R. Co.*, 49 id. 167. Proper qualifications, once possessed, may be presumed to continue, and the master may rely on that presumption until notice of a change. *Chapman v. Erie R. Co.*, 55 N. Y. 579. But see *post*, p. —.

³ *Gregory v. Hill*, 8 Ct. of Sess. (Sc.)

owner of a cotton-factory and also of a foundry, the employés in both are subject to the same control, but they are not co-servants, because they are not engaged in a common service.¹ In order to create that relation the two elements must concur.

The relation of co-servant being established, there can be no recovery of the master by one for an injury inflicted upon him through the negligence of his co-servant,² because each is presumed to have

3d Series, 282; *Wilson v. Merry*, L. R. 1 Sc. App. 326; *Sawyer v. Rutland*, &c. R. R. Co., 27 Vt. 370; *Warburton v. Gt. Western Ry. Co.*, 4 H. & C. 695; *Graham v. North-Eastern Ry. Co.*, 18 C. B. n. s. 229; *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St. 186; *Smith v. Hudson River R. R. Co.*, 19 N. Y. 127; *Perry v. Ricketts*, 55 Ill. 234; *Mercer v. Jackson*, 54 Ill. 397; *Sammon v. N. Y. & Harlem R. R. Co.*, 62 N. Y. 251; *Toledo, &c. R. R. Co. v. Moore*, 67 Ill. 217; *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 670; *Seaver v. Railroad Co.*, 14 Gray (Mass.), 466; *Toledo, &c. R. R. Co. v. Ingraham*, 67 Ill. 309; *Lalor v. Chicago, &c. R. R. Co.*, 52 Ill. 401; *Foster v. Railroad Co.*, 14 Minn. 360; *Davis v. Detroit, &c. R. R. Co.*, 20 Mich. 105; *O'Donnell v. Railroad Co.*, 59 Penn. St. 239; *Kansas, &c. R. R. Co. v. Salmon*, 11 Kan. 86; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; *Feltham v. England*, L. R. 2 Q. B. 83; *Faulkner v. Erie R. R. Co.*, 49 Barb. (N. Y.) 324; *Columbus, &c. R. R. Co. v. Troesch*, 68 Ill. 545; *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Murphy v. Pollack*, 15 Ir. C. L. 224; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; *Searle v. Lindsay*, 11 C. B. n. s. 429; *Fay v. Davidson*, 13 Minn. 298.

¹ *Ohio, &c. R. R. Co. v. Hammersley*, 28 Ind. 371; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233; *Laning v. R. R. Co.*, 49 N. Y. 521; *Hoey v. Dublin, &c. Ry. Co.*, C. P. (Ireland), 18 W. R. 930; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Wilson v. Madison, &c. R. R. Co.*, 18 Ind. 226; *Gallagher v. Piper*, 16 C. B. (n. s.) 669; *Chamberlain v. R. R. Co.*, 11 Wis. 238; *Manville v. Cleveland, &c. R. R. Co.*, 11 Ohio St. (n. s.) 417;

Slattery v. Toledo, &c. R. R. Co., 23 Ind. 81. The servant of a contractor and the servants of a sub-contractor are not co-servants. *Curley v. Harris*, 11 Allen (Mass.), 112. Nor are the servants of a contractee and those of a contractor. *Young v. N. Y. Central R. R. Co.*, 30 Barb. (N. Y.) 229; *Donaldson v. Mississippi R. R. Co.*, 18 Iowa, 280; *Barrett v. Singer Mfg. Co.*, 1 Sweeney (N. Y.), 545; *Goodfellow v. Boston, &c. R. R. Co.*, 106 Mass. 461. When a contractor is employed to do work for another, the men employed by him cannot look to the employer for indemnity for injuries sustained by them in consequence of his negligence. The relation of master and servant does not exist between the contractor's employés. *Hunt v. R. R. Co.*, 51 Penn. St. 475.

² *Farwell v. Boston, &c. R. R. Co.*, 4 Met. (Mass.) 49; *Priestley v. Fowler*, 3 M. & W. 1; *Murray v. R. R. Co.*, 1 McMullan (S. C.), 385; *Wright v. R. R. Co.*, 25 N. Y. 562; *Wilson v. Merry*, L. R. 1 Sc. App. 326; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Gallagher v. Piper*, 16 C. B. (n. s.) 679; *Hard v. Vt. Central R. R. Co.*, 32 Vt. 473; *Wignore v. Jay*, 5 Exch. 352; *Noyes v. Smith*, 28 Vt. 59; *Tarrant v. Webb*, 18 C. B. 797; *Hutchinson v. Ry. Co.*, 5 Exch. 343; *Ryan v. R. R. Co.*, 23 Penn. St. 384; *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; *Bartonshill Coal Co. v. Reid*, 3 Macq. (Sc.) 266; *Sherman v. R. R. Co.*, 17 N. Y. 153; *Coon v. Syracuse, &c. R. R. Co.*, 5 id. 492; *Russell v. R. R. Co.*, 17 id. 134; *Abrahams v. Reynolds*, 5 H. & N. 143; *Griffiths v. Gidlow*, 3 id. 648; *Carle v. R. R. Co.*, 43 Me. 269; *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 233; *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 270; *Washburn v.*

those risks in view and to contract in reference thereto;¹ but this presumption cannot be extended to embrace or cover perils not incident to the particular service, in all its details and incidents. When a person engages to perform services for a railroad company in *any* department, he is presumed to take upon himself all the risks of the service in *all* its departments, and cannot recover for injuries resulting from the negligence of servants in any department of the service;

Nashville, &c. R. Co., 3 Head (Tenn.), 638; Tunney v. Midland R. Co., L. R. 1 C. P. 289; Malone v. Hathaway, 64 N. Y. 5; Wonder v. Baltimore, &c. R. Co., 32 Md. 411; 3 Am. Rep. 140; Brown v. Accrington Cotton Co., 3 H. & C. 511; Lawler v. Androscoggin R. R. Co., 62 Me. 463; O'Connell v. Baltimore, &c. R. R. Co., 20 Md. 212; Western, &c. R. R. Co. v. Bishop, 50 Ga. 465; Searle v. Lindsay, 11 C. B. (N. s.) 429; Coulter v. Board of Education, 4 Hun (N. Y.), 569; Ray v. Boston, &c. R. R. Co., 9 Cush. (Mass.) 112; Brickner v. N. Y. C. R. R. Co., 2 Lans. (N. Y.) 506; Noyes v. Smith, 28 Vt. 63; Patterson v. Wallace, 28 Eng. Law & Eq. 48; Mullan v. Steamship Co., 78 Penn. St. 26; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Coombs v. New Bedford Cordage Co., 102 Mass. 572; 3 Am. Rep. 506; Bradley v. N. Y. C. R. Co., 3 T. & C. (N. Y.) 288; 66 N. Y. 99; Chicago, &c. R. R. Co. v. Murphy, 53 Ill. 336; 5 Am. Rep. 48; Lovegrove v. London, &c. Ry. Co., 111 E. C. L. 669; Lalor v. Chicago, &c. R. R. Co., 52 Ill. 401; Moran v. R. R. Co., 3 T. & C. (N. Y.) 770; Cooper v. Milwaukee, &c. R. R. Co., 23 Wis. 668; Mann v. Oriental Print Works, 11 R. I. 312; Honner v. Ill. Central Ry. Co., 15 Ill. 550; Harper v. Indianapolis R. R. Co., 47 Mo. 567; Rohback v. Pacific R. R. Co., 46 id. 163; Davis v. R. R. Co., 20 Mich. 105; 4 Am. Rep. 364; Leahey v. M. C. R. R. Co., 10 Mich. 199; Caldwell v. Brown, 53 Penn. St. 457; Weger v. Penn. R. R. Co., 55 id. 460; Moseley v. Chamberlain, 18 Wis. 700; Harrison v. Central R. R. Co., 31 N. J. L. 293; Thayer v. St. Louis R. R. Co., 22 Ind. 26; P. Ft. W. & C. R. Co. v. Devinney, 17 Ohio St. 209; O. & M. R. R. Co. v. Tindall, 13 Ind. 366; Moss v. Pacific R. R. Co., 49 Mo. 167; 8 Am. Rep. 126; Young

v. R. R. Co., 30 Barb. (N. Y.) 229; Lansing v. N. Y. C. R. R. Co., 49 N. Y. 521; Murphy v. Caralli, 3 H. & C. 462; Louisville, &c. R. R. Co. v. Collins, 2 Duv. (Ky.) 114; Mellor v. Shaw, 7 Jur. (N. s.) 845; Ormond v. Holland, 1 El. Bl. & E. 102; Skipp v. E. Counties Ry. Co., 9 Exch. 223; Indianapolis R. R. Co. v. Love, 10 Ind. 554; Degg v. Midland Ry. Co., 21 Jur. 395; Noyes v. Smith, 28 Vt. 63; Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71; Kansas Pacific R. R. Co. v. Salmon, 11 Kan. 83; Railroad Co. v. Fort, 17 Wall. (U. S.) 553; Ryan v. Chicago, &c. R. R. Co., 60 Ill. 171; Alabama, &c. R. R. Co. v. Waller, 48 Ala. 459; N. O., &c. R. R. Co. v. Hughes, 49 Miss. 258; Chapman v. Erie R. R. Co., 55 N. Y. 579; Hofnagle v. N. Y. Central, &c. R. R. Co., 55 id. 608; Nashville, &c. R. R. Co. v. Carroll, 6 Heisk. (Tenn.) 849.

¹ Tunney v. Midland R. R. Co., L. R. 1 C. P. 291; Ryan v. Cumberland Valley R. R. Co., 23 Penn. St. 384. Engineers and brakemen are in the same class of service, and the fact that one serves on a passenger, and the other on a freight train does not affect the reason and policy of implying between them such associations, knowledge, and trust, as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert. Louisville, &c. R. R. Co. v. Robinson, 4 Bush (Ky.), 507; Whaalan v. M. R. & Lake Erie R. R. Co., 8 Ohio St. 249; Indianapolis Railroad Co. v. Love, 10 Ind. 554; Indianapolis R. R. Co. v. Klein, 11 id. 38; R. R. Co. v. Murphy, 53 Ill. 336; Noyes v. Smith, 28 Vt. 59; Bartonshill Coal Co. v. Reid, 3 Macq. (Sc.) 267; Farwell v. Boston, &c. R. R. Co., 4 Met. (Mass.) 49; Murray v. R. R. Co., 1 McMullan (S. C.), 385; Priestley v. Fowler, 3 M. & W. 1.

because every person in the company's employ is engaged in the same common pursuit, and for the same common end and purpose. The servant who engages as a track-hand knows that for the prosecution of the business of his master, engineers, firemen, brakemen, machinists, conductors, station-agents, etc., are required, and must be employed in order that the business may go on, and that, without the employment of all these agents and agencies, the business of repairing the tracks would be of no avail, and that, although his sphere of service is humble, yet that he is only one of numerous adjuncts essential to the prosecution of a complicated business. And he is very reasonably and justly presumed to take upon himself the risks incident to his co-operation with them. Therefore, a person is a co-servant with each and every person, in whatever department or sphere of service they are engaged, who, in any measure, co-operates in the operation or prosecution of the business,¹ and is subject to the same general direction and control.² Superiority in grade or rank does not change the relation,³ unless the superior-servant is

¹ *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228; *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 270; *Albro v. Agawam Canal Co.*, 6 id. 75; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. (Mass.) 49; *Wright v. Railroad Co.*, 25 N. Y. 561; *Sherman v. Rochester, &c. R. R. Co.*, 17 id. 153; *Coon v. Syracuse, &c. R. R. Co.*, 5 id. 492; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Thayer v. St. Louis R. R. Co.*, 22 Ind. 26; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Seavér v. Boston &c. R. R. Co.*, 14 Gray (Mass.), 466; *Gilman v. Eastern R. R. Co.*, 10 Allen (Mass.), 283; *Caldwell v. Brown*, 53 Penn. St. 453; *Railroad Co. v. Leahey*, 10 Mich. 193; *Ponton v. Railroad Co.*, 6 Jones (N. C.), 245; *O'Connell v. Railroad Co.*, 20 Md. 212; *Illinois, &c. R. R. Co. v. Cox*, 21 Ill. 20; *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Columbus, &c. R. R. Co. v. Webb*, 12 Ohio St. 475; *Weger v. Penn. R. R. Co.*, 55 Penn. St. 460; *Carle v. Bangor R. R. Co.*, 43 Me. 269; *Shields v. Yonge*, 15 Ga. 349; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384; *Manville v. Cleveland, &c. R. R. Co.*, 10 Ohio St. 417; *Pittsburgh, &c. R. R. Co. v.*

Devinney, 17 id. 197; *Walker v. Bolling*, 22 Ala. 294.

² *O'Donnell v. R. R. Co.*, 59 Penn. St. 239; *Wiggett v. Fox*, 11 Exch. 832; *Tarrant v. Webb*, 37 Eng. Law & Eq. 281; *Lovegrove v. London, Brighton, &c. Ry. Co.*, 16 C. B. (N. S.) 669; *Waller v. South-Eastern Ry. Co.*, 2 H. & C. 102; *Senior v. Ward*, 1 E. & E. 391.

³ *Sherman v. Syracuse, &c. R. R. Co.*, 17 N. Y. 153; *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Malone v. Hathaway*, 64 N. Y. 5; *Feltham v. England*, L. R. 2 Q. B. 33; *Wilson v. Merry*, L. R. 1 H. L. 326; *Delaware & H. Canal Co. v. Carroll*, 89 Penn. St. 374; *Mobile, &c. R. R. Co. v. Smith*, 59 Ala. 245; *O'Connor v. Roberts*, 120 Mass. 227; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384; *Wonder v. Baltimore, &c. R. R. Co.*, 32 Md. 411; *Mobile, &c. R. R. Co. v. Thomas*, 42 Ala. 672; *Thayer v. St. Louis, &c. R. R. Co.*, 22 Ind. 26; *Cumberland Coal, &c. Co. v. Scully*, 27 Md. 589; *Robinson v. Houston, &c. R. R. Co.*, 46 Tex. 540; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Blake v. Maine Central R. R. Co.*, 70 Me. 60; *Laning v. N. Y. Central R. R. Co.*, 49 N. Y. 521.

charged with the duties of the master to the servant, so that he may fairly be said to stand in the place of the master in reference to the particular duty from a breach of which injury results, which is in all doubtful cases a question for the jury.¹ But in the case of an operative in a cotton-mill, the owner of which is also engaged in operating an iron-foundry; there is no co-service between the operatives, because they are separate and distinct branches of business, and the operation of the one has no connection with the other, and is not essential to the operation of the other;² consequently, the servants engaged in the one service are not co-servants with those engaged in the other, any more than they would be if the establishments were owned by different persons. But if the business of the two establishments was dependent, the one upon the other, — as, if one establishment was in any measure essential to the operation of the other, so that they were both co-operating to secure the same common result — then there would be co-service, and the operatives in each would be co-servants. It is not a question whether the one business can go on without the other, but whether the business of the two is blended, so that the servants of both co-operate with each other. Thus it will be seen that the real test of co-service is *subjection to the same general control, and co-operation to secure a common result*.³ This embraces *all* persons controlled by the same general master, and engaged in the same common business in whatever department or sphere.⁴ *If there is a natural or necessary connection*

¹ *Mullan v. Steamship Co.*, 78 Penn. St. 26; *Thayer v. St. Louis, &c. R. R. Co.*, 22 Ind. 26; *O'Connell v. Baltimore, &c. R. R. Co.*, 20 Md. 212; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Sherman v. Rochester & Syracuse R. R. Co.*, 17 N. Y. 153; *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Shauck v. Northern, &c. R. R. Co.*, 25 Md. 462.

² *Morgan v. Vale of Neath R. R. Co.*, L. R. 1 Q. B. 149.

³ *Farwell v. Boston, &c. R. R. Co.*, 4 Met. (Mass.) 49; *Morgan v. Vale of Neath Ry. Co.*, *ante*; *Chicago, &c. R. R. Co. v. Murphy*, *ante*; *Svenson v. Steamship Co.*, *ante*; *Abrahams v. Reynolds*, *ante*.

⁴ *Conroy v. Belfast & Northern Counties Ry. Co.*, Ir. L. T. Rep. 217; *Lalor v. Chicago, &c. R. R. Co.*, 4 Am. Rep.

616, 52 Ill. 401; *Chicago, &c. R. R. Co.*, 5 Am. Rep. 48; 53 Ill. 336. The receiver of a railroad and a servant employed on the railroad are not fellow-servants. *Meara v. Holbrook*, 5 Am. Rep. 633; 20 Ohio St. 187. In *Howell v. Landore Siemens' Steel Co.*, 31 L. R. (N. S.) 433, it was held that a workman in a colliery is a fellow-servant of the manager. But in *Louisville & Nashville R. R. Co. v. Bowler*, 11 Alb. L. J. 119, it was held that a common laborer and a "section-boss" on a railroad were not fellow-servants. The cases are numerous on this subject, and are not harmonious. The true rule seems to be, that the master is liable where the negligent servant is placed in such a position of authority as fairly to represent the master. In *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549, it was held that a corpora-

*between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, they are co-servants, however dissimilar their occupation may be.*¹ Under

tion is liable for negligence in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance. This rule is often applied in respect to injuries to servants from defective machinery or appliances. *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Albro v. Canal Co.*, 6 Cush. (Mass.) 75; *Wigmore v. Jay*, 5 Exch. 354.

¹ *Morgan v. The Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; *Waller v. South-Eastern Ry. Co.*, 2 H. & R. 102; *Lovegrove v. London, &c. Ry. Co.*, 16 C. B. (N. S.) 669. A brakeman, engineer, conductor, switchman, trackman, carpenter, superintendent, telegraph-operator, station-agent, and indeed *all* persons in the employ of the company, subject to its direction and control, and engaged in any department in the operation of the road are fellow-servants, as also are trackmen and engineers, — *Whaalan v. Mad River, &c. R. R. Co.*, 8 Ohio St. 249; engineer and switchman, — *Columbus, &c. R. R. Co. v. Froesch*, 68 Ill. 545; engineer and machinists, — *Noyes v. Smith*, 28 Vt. 59; a telegraph-operator and train-hands, — *Chapman v. N. Y. Central R. R. Co.*, 55 N. Y. 579; train-hands, laborers, etc., and superintendent, — *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. —; brakemen and engineers, — *Summerhays v. Railroad Co.*, 2 Cal. 484; *Nashville, &c. R. R. Co. v. Wheeler*, 10 Lea (Tenn.), 741; train-hands and carpenters, — *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B.; train-hands and ordinary laborers, — *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 289; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228; train-hands and train-dispatcher, — *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; train-hands and track-layers, — *Lovegrove v. London, &c. Ry. Co.*, 16 C. B. (N. S.) 669; *Collins v. St. Paul, &c. R. R. Co.*, 30 Minn. 31; a gang boss and other workmen, — *Keystone Bridge Co. v. Newberry*, 96 Penn. St. 246.

And without stopping to enumerate or specify the particular classes of labor which constitute co-service, it may be said that mere difference in the grade of service does not destroy the relation, and that even foremen, superintendents, etc., are co-servants with others in the same employ, *except as to matters in which they are charged with some duty which the master owes to the servant as a personal duty*. *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Hoke v. St. Louis, &c. R. R. Co.*, 11 Mo. App. 574; *Dwyer v. Am. Express Co.*, 55 Wis. 453. See, for instances in which persons engaged in different departments of service have been held to be co-servants, *McGowan v. St. Louis, R. R. Co.*, 61 Mo. 528; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Coon v. Syracuse, &c. R. R. Co.*, 5 N. Y. 492; *Boldt v. N. Y. Central R. R. Co.*, 70 N. Y. 171; *Sherman v. Rochester, &c. R. R. Co.*, 17 N. Y. 153; *Ragsdale v. Memphis, &c. R. R. Co.*, 3 Baxt. (Tenn.) 426; *Chicago, &c. R. R. Co. v. Rush*, 84 Ill. 570; *Tinney v. Boston, &c. R. R. Co.*, 52 N. Y. 632; *Slattery v. Toledo, &c. R. R. Co.*, 23 Ind. 81; *Illinois Central R. R. Co. v. Keen*, 72 Ill. 512; *Moran v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Weger v. Penn. R. R. Co.*, 55 Penn. St. 460; *St. Louis, &c. R. R. Co. v. Britz*, 72 Ill. 256; *Zeigler v. Day*, 123 Mass. 152; *Foster v. Minn. Central R. R. Co.*, 14 Minn. 360; *Sammon v. N. Y. Central R. R. Co.*, 62 N. Y. 251; *Hanrathy v. Northern Central R. R. Co.*, 46 Md. 280; *Russell v. Hudson River R. R. Co.*, 5 Duer (N. Y.), 39; *O'Donnell v. Allegheny R. R. Co.*, 59 Penn. St. 239; *Seaver v. Boston, &c. R. R. Co.*, 14 Gray (Mass.), 466; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384; *Moss v. Johnson*, 22 Ill. 633; *Kumler v. Junction R. R. Co.*, 23 Ohio St. 150; *Union Pacific R. R. Co. v. Nichols*, 11 Kan. 83; *Manville v. Cleveland, &c. R. R. Co.*, 11 Ohio St. 417; *Columbus, &c. R. R. Co. v. Webb*, 12 Ohio St. 475; *New Orleans, &c. R. R. Co. v. Hughes*, 49 Miss. 258; *Waller v. South-Eastern*

this rule it is held that a telegraph-operator employed by a railroad company to send messages relative to the running of its trains, and perform general duties in telegraphy connected with the business of the road, is a co-servant with the train-hands and other employes of the road; and his negligence in the transmission or delivery of such dispatches, whereby a collision of trains results, is the negligence of a co-servant, precluding other employes of the company sustaining injuries thereby from recovering of the company.¹ And an assistant-surveyor or chain-man employed by a railroad company has been held to be a fellow-servant with a conductor running its trains.² And the rule may be said to extend to all employes engaged in a common service, and subject to the same general control, no matter how diverse or distinct their duties may be.³ This rule is modified by the peculiar views which obtain in some jurisdictions. Thus, in Tennessee, the rule is well settled that the servant does not assume the risk of the negligence of another servant, where the latter is engaged in a different department of a work or service; as, for instance, the train crew do not assume the risk of the negligence of the track or section-hands.⁴ This limitation upon the general rule exists also

Ry. Co., 2 H. & C. 102; *Holden v. Fitchburg R. Co.*, 129 Mass. 384; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Hath v. Peters*, 55 Wis. 405; *Dwyer v. Am. Express Co.*, 55 Wis. 453; *Hoke v. St. Louis, &c. R. Co.*, 11 Mo. App. 574; *Hilfrich v. Williams*, 84 Ind. 553; *Bull v. Mobile, &c. R. Co.*, 67 Ala. 206; *McDonald v. Phenix Mfg. Co.*, 67 Ga. 761; *Hunt v. N. Y. Floating Docks Co.*, 48 N. Y. Superior Ct. 460; *Stringham v. Stewart*, 64 How. Pr. (N. Y.) 5. A station-agent is a fellow-servant with the engineer of a train. *Brown v. Minneapolis, &c. R. Co.*, 31 Minn. 553; 15 Am. & Eng. R. Cas. 38; *Toner v. Chicago, &c. R. Co.*, 69 Wis. 188; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *McGowan v. St. Louis, &c. R. Co.*, 61 Mo. 528 (conductor and laborer unloading cars); *Thomp. Neg.*, 1037, § 38; *Floyd v. Sugden*, 134 Mass. 563; *Summersell v. Fish*, 117 id. 312; *Griffiths v. Gidlow*, 3 H. & N. 648; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Wood, Master and Servant*, § 371; *Brown v. Winona, &c. R. Co.*, 27 Minn. 162; *Heine v. Chicago, &c. R. Co.*, 17 id. 420; *Zeigler v. Day*, 123 Mass. 152; *McCosker v. Long*

Island R. Co., 84 N. Y. 77; *Harvey v. Railroad Co.*, 88 id. 481; *Slattery v. Toledo, &c. R. Co.*, 28 Ind. 31 (brake and switch man); *Flynn v. Salem*, 134 Mass. 351.

¹ *Slater v. Jewett*, 85 N. Y. 61; 39 Am. Rep. 627; 5 Am. & Eng. R. Cas. 515. Compare *Sheehan v. N. Y. Central R. Co.*, 91 N. Y. 332. So also an engineer and an operator are fellow-servants. *Dana v. New York, &c. R. Co.*, 23 Hun (N. Y.), 473. But under the Tennessee rule a conductor is not the fellow-servant of a telegraph-operator whose only connection with such conductor is as transmitter of the superintendent's orders. *East Tenn., &c. R. Co. v. De Armond*, 86 Tenn. 77. A train-dispatcher is not a fellow-servant with a brakeman, *Phillips v. Chicago, &c. R. Co.*, 64 Wis. 475.

² *Ross v. N. Y. Central R. Co.*, 5 Hun (N. Y.), 488; *affirmed*, 74 N. Y. 617.

³ *Malone v. Hathaway*, 64 N. Y. 5.

⁴ *East Tennessee, &c. R. Co. v. De Armond*, 86 Tenn. 78. The court therefore held that the conductor of a train was not a fellow-servant with the telegraph operator at the station. See the rule applied in *Haynes v. East Tenn., &c. R. Co.*,

in Georgia, Illinois, and Kentucky,¹ though in Tennessee, if not in other jurisdictions, it is confined entirely to employes in the service of a railroad company.² But the limitation set up in these States, though the reasons in its favor are plausible, has been rejected in a large number of cases, commencing with the noted Farwell case decided by Chief Justice SHAW.³

3 Cold. (Tenn.) 322; Nashville, &c. R. Co. v. Carroll, 6 Heisk. (Tenn.) 347; Nashville, &c. R. Co. v. Wheelless, 10 Lea (Tenn.), 744.

¹ Cooper v. Mulhis, 30 Ga. 150; Toledo, &c. R. Co. v. O'Connor, 77 Ill. 391 (day-laborer at work on the track may recover for injury by engineer); Holton v. Daly, 4 Ill. App. 25; Toledo, &c. R. Co. v. Ingraham, 77 Ill. 309; Chicago, &c. R. Co. v. Moranda, 93 Ill. 302; 108 Ill. 576; 17 Am. & Eng. R. Cas. 564. In this last case, at both hearings, the court in the course of the opinion said: "In order to constitute servants of the same master, fellow-servants within the rule *respondet superior*, it is not enough that they are engaged in doing parts of some work, or in the promotion of some enterprise carried on by the master, not requiring co-operation nor bringing the servants together, or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety, but it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution." The case of Chicago, &c. R. Co. v. Murphy, 53 Ill. 386, which defined the term "fellow-servants," was overruled as stating the rule too broadly. Compare Chicago, &c. R. Co. v. O'Bryan, 15 Ill. App. 134. The court goes on to hold (108 Ill. 583) very decidedly that the question as to "whether the servants were so co-operating or consociating is a question of fact for the jury and not of law for the court," quoting with approval the language used in Indianapolis, &c. R. Co. v. Morgenstern, 106 Ill. 216; 12 Am. & Eng. R. Cas. 228, that "the definition of fellow-servants may be a question of law, but it is always a ques-

tion of fact, to be determined from the evidence, whether the particular case falls within the definition." See Wabash, &c. R. Co. v. Elliott, 98 Ill. 481; Pennsylvania Co. v. Conlan, 101 Ill. 93; Chicago, &c. R. Co. v. Bonifield, 104 Ill. 223; Devine v. Tarrytown, &c. Co. 22 Hun, 26; Haas v. Penn. Steamship Co., 88 Penn. St. 269.

² Coal Creek Min. Co. v. Davis, 90 Tenn. 711.

³ Farwell v. Boston, &c. R. Co., 9 Met. (Mass.) 49; Johnson v. Boston, 118 Mass. 114; Holden v. Fitchburg R. Co., 129 Mass. 268; 2 Am. & Eng. R. Cas. 294; Wonder v. Baltimore, &c. R. Co., 32 Md. 411; Baltimore Elevator Co. v. Neal, 65 Md. 438; Foster v. Minn. Central R. Co., 14 Minn. 360; Quincy Min. Co. v. Kitts, 42 Mich. 34; Kirk v. Atlanta, &c. R. Co., 94 N. C. 625; 25 Am. & Eng. R. Cas. 507; Keystone Bridge Co. v. Newberry, 96 Penn. St. 246; 42 Am. Rep. 543; New York, &c. R. Co. v. Bell, 112 Penn. St. 400; 28 Am. & Eng. R. Cas. 338; Texas, &c. R. Co. v. Harrington, 62 Tex. 597; 21 Am. & Eng. R. Cas. 571. In the case of Farwell v. Boston, &c. R. Co., 4 Met. (Mass.) 61, SHAW, C. J., in reference to the general rule went on to say: "It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of the other. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one

SEC. 389. Duty of Master as to Selection of Servants. — The rule applicable in the case of machinery applies in a great measure to the selection of co-servants, and the master is only liable to one servant for an injury inflicted upon him through the negligence of a co-servant when he can be charged with some fault or negligence in his employment or retention.¹ He is bound to use reasonable care in the selection of competent servants, and to furnish them with suitable means to perform the service in which he has employed them; but when he has done that, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service.² He is, however, bound

and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

"Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied.

The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence, the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers, for the negligence of a servant."

¹ *Lovell v. Howell*, 1 C. P. Div. 161; *Alabama, &c. R. Co. v. Waller*, 48 Ala. 459; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324; *Farwell v. Boston, &c. R. Co.*, 4 Met. (Mass.) 49; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Feltham v. England*, L. R. 2 Q. B. 33; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 73; *Sherman v. Rochester, &c. R. Co.*, 17 N. Y. 153; *Noyes v. Smith*, 28 Vt. 59; *Seaver v. Boston, &c. R. Co.*, 14 Gray (Mass.), 466; *Illinois, &c. R. Co. v. Jewell*, 46 Ill. 99; *Caldwell v. Brown*, 58 Penn. St. 453; *Weger v. Penn. R. Co.*, 55 Penn. St. 460.

² *Harper v. Indianapolis, &c. R. Co.*, 47 Mo. 567; 4 Am. Rep. 353; *Davis v. Detroit, &c. R. Co.*, 20 Mich. 105; 4 Am. Rep. 361. In Georgia, by statute, where a servant receives an injury, without fault on his part, he may recover for an injury resulting from the negligence of a co-servant. *Thompson v. Central R. & B. Co.*, 54 Ga. 509. And this is the case in Iowa, — *Hunt v. Chicago, &c. R. Co.*, 26 Iowa, 363, — Missouri, Wisconsin, and several of the States. But in such cases, actual negligence is required to be shown. *Sulli-*

to continue to exercise a reasonable care in ascertaining their qualities as servants *while engaged in his service*, and to discharge those who, from any cause, prove inefficient or incompetent, as soon as knowledge thereof comes to him, or by the exercise of due diligence on his part ought to be possessed by him.¹

SEC. 390. Master does not warrant Servants' Competency. — The master does not warrant the competency of his servants; but there is an implied contract on his part, that he will use due and reasonable care in their selection and retention, and whether he has done so or not in a given case is a question for the jury;² and the question is not whether the servant was incompetent, but whether the master used that degree of care in his selection that a man of ordinary care would use in view of the nature of the employment, and the consequences

van v. Mississippi, &c. R. Co., 11 Iowa, 421; Michigan, &c. R. Co. v. Leahey, 10 Mich. 193; Schenck v. Railroad Co., 25 Ind. 462; Treadwell v. Mayor, &c., 1 Daly (N. Y.), 123; Wright v. N. Y. Central R. Co., 25 N. Y. 562; McDermott v. Pacific R. Co., 30 Mo. 115; Manville v. Railroad Co., 11 Ohio St. 417; Railroad Co. v. Bacon, 6 Ind. 205; Hard v. Vermont R. Co., 32 Vt. 473; Noyes v. Smith, 28 id. 59; Anderson v. New Jersey R. Co., 7 Robt. (N. Y.) 611; Beaulieu v. Portland, &c. R. Co., 48 Me. 291; Ponton v. Railroad Co., 6 Jones (N. C.), 245; Moss v. Johnson, 22 Ill. 623.

¹ Wright v. N. Y. Central R. Co., 25 N. Y. 562; Laning v. New York, &c. R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Harper v. Indianapolis R. Co., 47 Mo. 567; Moss v. Pacific R. Co., 49 Mo. 167; 8 Am. Rep. 126; Hard v. Vermont, &c. R. Co., 32 Vt. 473; Wiggett v. Fox, 36 Eng. L. & Eq. 486; Noyes v. Smith, 28 Vt. 59; Davis v. Detroit, &c. R. Co., 20 Mich. 364; Boldt v. N. Y. Central R. Co., 81 N. Y. 433; Russell v. Hudson River R. Co., 17 N. Y. 136; Ryan v. Cumberland Valley R. Co., 23 Penn. St. 384; Madison, &c. R. Co. v. Bacon, 6 Ind. 205; Frazier v. Penn. R. Co., 38 Penn. St. 134; Noyes v. Smith, 28 Vt. 59; Hard v. Vermont, &c. R. Co., 32 Vt. 473; Wright v. N. Y. Central R. Co., 25 N. Y. 562; Whaalan v. Mad River R. Co., 8 Ohio St. 249; Indianapolis R. Co. v. Klein, 11 Ind. 38; Ormond v. Holland, 1 El., Bl., & El. 102; Coon v.

Syracuse, &c. R. Co., 5 N. Y. 492; Wonder v. Balt., &c. R. Co., 32 Md. 411; Brothers v. Cartter, 52 Mo. 373; Brickner v. N. Y. Central R. Co., 2 Lans. (N. Y.) 506. In a case in Michigan, the court stated what appears to be the true rule in this connection: "The defendant was required to exercise reasonable care in its supervision of the conduct of its servants, with a view to ascertain whether they were fit or competent persons to be retained in its employment; but this duty must be performed with reference to the nature of the employment and the dangers likely to be caused by the employment of unfit or incompetent persons. It was required to exercise a closer supervision over the habits and conduct of an engineer than over a brakeman or a common laborer. The position of engineer is one of the most responsible positions connected with railroad service and calls upon the employer not only to use reasonable care in the selection of competent men for the position, but reasonable diligence in seeing that they remain trustworthy in the discharge of their duties."

² Tarrant v. Webb, 18 C. B. 797; Merry v. Wilson, L. R. 1 S. & D. 326; Ormond v. Holland, 1 El., Bl., & El. 102; Indianapolis R. Co. v. Love, 10 Ind. 554; Columbus, &c. R. Co. v. Webb, 12 Ohio St. 475; Hard v. Vt. & Canada R. Co., 32 Vt. 473; and indeed this may be said to be a necessary inference from all the cases in which the question is discussed.

of the employment of an incompetent person.¹ He does not warrant to each person who engages in the service the competency of every servant employed, and cannot be made responsible, unless it is shown that he was guilty of a want of care in the selection of the person through whose negligence the injury occurred ;² but he does impliedly undertake that he will exercise reasonable care in this respect, and that he will continue to exercise such care, even after their employment, by discharging those who prove incompetent, so that his servants shall not be exposed to more than the ordinary hazards incident to the service.

SEC. 391. **Degree of Care required of the Master.** — The degree of care to be exercised by a master in the selection of servants, materials, or machinery, is such as is reasonable and proper, in view of the nature and character of the business, and the consequences likely to result from a negligent or unskilful execution of the work, or from defective or improper appliances. Thus, a higher degree of care would be required in the employment of a servant to run a locomotive upon a railway than in the employment of a brakeman, or in the employment of a switch-tender than in the employment of an ordinary track-hand ; for the consequences of the employment of an unskilful or careless person in one place would result in more serious consequences than in the other. And so, generally, the degree of care to be observed in the employment of laborers must be commensurate with the nature and the dangers of the business, and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless and incompetent person, and such care as a reasonably prudent man would exercise in the same business or undertaking.³

¹ *Tarrant v. Webb*, 18 C. B. 797.

² *Treadwell v. Mayor, etc.*, of N. Y., 1 Daly (N. Y.), 123 ; *Coon v. Syracuse, &c. R. Co.*, 5 N. Y. 492 ; *Sherman v. Rochester, &c. R. Co.* 17 N. Y. 153 ; *Whaalan v. Mad River C. Co.*, 8 Ohio St. 249 ; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562.

³ In the case of *Wabash R. Co. v. McDaniels*, 107 U. S. 454 ; 11 Am. & Eng. R. Cas 158, which was an action by a brakeman against the company for injuries resulting from the negligence of a telegraph-operator, HARLAN, J., speaking for the court, discussed this question at some length, observing : " The decisions, with

a few exceptions not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But according to the best considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care in the selection of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of the employer, is fairly commensurate with the perils or danger likely to be encountered. In substance, though not in words, the jury were so instructed in the present case. That

If a railroad company should employ a person as engineer who was a stranger to them, and about whose experience or skill they knew nothing, either by their own observation or information from others, and he should prove incompetent *in fact*, this would doubtless be regarded as such negligence on their part as would render them liable for all injuries resulting to other of their servants therefrom; and the same is applicable to every species of skilled or hazardous service. In every case the question of reasonable care, or want of care, is a question of fact for the jury; and the circumstances attending the hiring are necessarily material; and if claimed to be upon insufficient circumspection or care, the plaintiff should show the fact by proof.¹

the court did not use the word 'ordinary' in its charge is of no consequence since the jury were rightly instructed as to the degree of diligence which the company was bound to exercise in the employment of telegraphic night-operators. The court correctly said that that was a position of great responsibility, and, in view of the consequences which might result to employes from the carelessness of telegraphic operators, upon whose reports depended the moving of trains, the defendant was under a duty to exercise 'proper and great care' to select competent persons for that branch of its service. . . . Ordinary care then, implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employé, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise." The court then went on to say that it could not give its assent to the view "that ordinary care in the employment and retention of railroad employes means only that degree of diligence which is customary or is sanctioned by the general practice and usage which obtains among those intrusted with the management and control of railroad property and railroad employes. There are general expressions in adjudged cases which apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which, at

all times, should characterize the intercourse between officers of railroad corporations and their employes." The judgment of the lower court in favor of the plaintiff was therefore affirmed. See similar views expressed in *Louisville, &c. R. Co. v. Allen*, 78 Ala. 494.

¹ *Lalor v. Chicago, &c. R. Co.*, 52 Ill. 401; *Columbus, &c. R. Co. v. Troesch*, 68 Ill. 545; *Connolly v. Poillon*, 41 Barb. (N. Y.) 366; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Wonder v. Baltimore R. Co.*, 32 Md. 411; *O'Donnell v. Allegheny, &c. R. Co.*, 59 Penn. St. 239; *Moran v. N. Y. Central R. Co.*, 3 Th. & C. (N. Y.) 770; *Cooper v. Milwaukee, &c. R. Co.*, 23 Wis. 668; *Noyes v. Smith*, 28 Vt. 29; *Hutchinson v. York, &c. Ry. Co.*, 5 Exch. 352; *Gilman v. Eastern R. Co.*, 10 Allen, 238; *Tarrant v. Webb*, 18 C. B. 797; *Bartonshill Coal Co. v. Reid*, 3 Macq. 272; *Ormond v. Holland*, 1 El., Bl., & El. 102; *Weems v. Mathieson*, 4 Macq. (Sc.) 215; *Clarke v. Holmes*, 7 H. & N. 937; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Fox v. Sandford*, 4 Sneed (Tenn.), 36; *Anderson v. New Jersey R. Co.*, 7 Robt. (N. Y.) 611; *McMahon v. Davidson*, 12 Minn. 357; *Frazier v. Penn. R. Co.*, 38 Penn. St. 104; *Michigan R. Co. v. Leahey*, 10 Mich. 193; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Warner v. Erie R. Co.*, 39 N. Y. 471; *Illinois Central R. Co. v. Jewell*, 49 Ill. 99.

The duty of the master is not only to employ but to retain only such servants as are competent for the positions filled by them. It is as much incumbent upon him to detect the unfitness of a servant and to remove him, as it is to exercise care to employ only those who are competent and trustworthy.¹ In this case, however, as in the case of defective machinery, the master cannot be held responsible for incompetency which the exercise of ordinary care would not reveal, for the law does not require him to warrant the competency or fitness of his servants; his duty is discharged if he exercises that care which an ordinarily prudent and careful man would, in view of all the circumstances, have exercised.² And if a servant having knowledge of the incompetency of a fellow-servant, voluntarily continues in the service without complaint, he must be considered as assuming the risk, and cannot afterwards complain if he is injured as a result of such incompetency.³

¹ U. S. *Rolling Stock Co. v. Wilder*, 116 Ill. 100; 25 Am. & Eng. R. Cas. 414; *Louisville, &c. R. Co. v. Allen*, 78 Ala. 494; *Mich. Central R. Co. v. Gilbert*, 46 Mich. 176; 2 Am. & Eng. R. Cas. 230; *Harper v. Indianapolis, &c. R. Co.*, 47 Mo. 567; *McDermott v. Hannibal, &c. R. Co.*, 73 Mo. 516; 2 Am. & Eng. R. Cas. 85; *Chicago, &c. R. Co. v. Moranda*, 108 Ill. 576; 17 Am. & Eng. R. Cas. 564; *Atchison, &c. R. Co. v. Moore*, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433; *Houston, &c. R. Co. v. Myers*, 55 Tex. 110; *Houston, &c. R. Co. v. Patton* (Tex.), 9 S. W. Rep. 175; *Baulec v. New York, &c. R. Co.*, 59 N. Y. 356; *Tierney v. Minneapolis, &c. R. Co.*, 33 Minn. 311; 21 Am. & Eng. R. Cas. 545. Compare the case of *Chapman v. Erie R. Co.*, 55 N. Y. 585. In that case the trial court instructed the jury that thus: "But if, after a competent and proper person is employed for such a duty, his habits become such that it is unsafe to trust him any longer in that capacity, the company are bound to use, through their proper officers, such reasonable care and diligence in ascertaining what the man is after he is employed, as they would be in his original employment." The Court of Appeals referring to this instruction said: "We think this rule of diligence too broad, and cannot be sustained. The general rule

is that knowledge of incompetency is necessary to charge the principal with the duty of acting. In employing subordinates, the principal must exercise great care, and is required to institute affirmative inquiries to ascertain their character and qualifications, and negligence in this respect will create a liability; but after suitable persons have been employed, there is not the same reason for exacting such a high degree of diligence. Good character and proper qualifications once possessed may be presumed to continue, and I see no reason why a principal may not rely on that presumption as to these personal qualities, until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or at least such as would not put a reasonable man upon inquiry." See also *Blake v. Maine Central R. Co.*, 71 Me. 64.

² Mere proof of specific acts of carelessness on the part of a servant without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ. *Hoffman v. Chicago, &c. R. Co.*, 78 Mo. 50, 54; 17 Am. & Eng. R. Cas. 625.

³ The rule is the same here as in the case of injuries resulting from defective

SEC. 392. **Law presumes the Master has performed his Duty.** — *Prima facie*, where the law imposes a duty upon another, it presumes that such duty was properly performed; hence, from the mere circumstance that the servant is in fact incompetent, and that injury has resulted to other servants therefrom, the law will not presume want of care on the part of the master, although such facts are material circumstances, in connection with other facts, to establish want of care; and the burden in all such cases is upon the servant seeking a recovery, to establish the fact *that the injury resulted to him because the master did not exercise reasonable and proper care in these respects*; and this must be established as a *fact* in the case, and cannot result as an inference from the circumstance that the servant causing the injury was in fact incompetent, or that the materials or resources of the business were in fact defective.¹

Neither incompetency nor unskilfulness of a co-servant will be presumed; in order to make either available as a ground of action

machinery as stated *ante*, § 971. See *Stafford v. Chicago, &c. R. Co.*, 114 Ill. 244; *Kansas Pacific R. Co. v. Peavey*, 29 Kan. 169; 49 Am. Rep. 630; 11 Am. & Eng. R. Cas. 260; followed in 34 Kan. 472; *Dillon v. Union-Pac. R. Co.*, 3 Dill. (U. S.) 319; *Warrington v. Atchison, &c. R. Co.*, 46 Mo. App. 159; *Latremonille v. Bennington, &c. R. Co.*, 63 Vt. 336. Where it is doubtful whether the incompetency of the fellow-servant was apparent, or was known to the injured employé, the question is for the jury. See *New York Steamship Co. v. Anderson*, 50 Fed. Rep. 462; 1 C. C. A. 529; 1 U. S. App. 176. But a servant is not precluded from a recovery where he complained to the proper authorities of the incompetency of his fellow-servants and was promised that they should be removed, his employers at the same time requesting him to continue with them for a short time longer. *Wrest v. Erie City Iron Works (Penn.)*, 24 Atl. Rep. 291. If the injured servant had the same means of knowing the incompetency of his fellow-servants as did his master, he cannot recover for an injury resulting from such incompetence, unless he can show actual knowledge of it by the master. *Davis v. Detroit, &c. R. Co.*, 20 Mich. 105; *Indiana, &c. R. Co. v. Dailey*, 110 Ind. 75.

¹ *Baulec v. New York, &c. R. Co.*, 59

N. Y. 356; *Moß v. Pacific R. Co.*, 49 Mo. 167; *Davis v. Detroit R. Co.*, 20 Mich. 105; *Tarrant v. Webb*, 18 C. B. 797. The rule as stated in *Wood's Law of Master and Servant*, p. 800, § 419, and approved in *Hoffman v. Chicago, &c. R. Co.*, 78 Mo. 54; 17 Am. & Eng. R. Cas. 625, is this: "Therefore the mere fact that a fellow-servant is incompetent, that materials have proved defective, or that the appliances or machinery used in the prosecution of the business have proved insufficient, does not tend even *prima facie* to establish negligence on his part, but the burden in all such cases is upon the servant seeking a recovery to establish the fact that the injury resulted to him because his master did not exercise reasonable and proper care in these respects, or either of them, and this must be established as a fact in the case, and cannot result as an inference from the circumstances that the servant causing the injury was in fact incompetent, or that the materials or resources of the business were in fact defective." See in support of the same view *Hilts v. Chicago, &c. R. Co.*, 55 Mich. 444; *Chicago, &c. R. Co. v. Geary*, 110 Ill. 383; *Stafford v. Chicago, &c. R. Co.*, 114 Ill. 244; *Summerhays v. Kansas Pac. R. Co.*, 2 Col. 484; *Davis v. Detroit, &c. R. Co.*, 20 Mich. 105.

it must be proved; and merely showing the manner in which he did the particular act complained of is not generally of itself sufficient to warrant such an inference.¹ For an injury resulting *entirely* from the negligence of a co-servant, no fault being imputable to the master in his employment or retention, no liability exists on his part.² Liability attaches only when the master is at fault,³ and in all cases the burden is upon the servant to show want of care on the part of the master in selecting or retaining the negligent or unskilful servant, as well also as negligence or unskilfulness in the servant;⁴ and if it appears that the servant had, or ought to have had, the same knowledge of the servant's incompetency that the master had, he cannot recover. He is not bound to inquire, to ascertain his co-servant's habits or qualities as a servant, but he is bound to see what transpires in his presence; but he is not in all cases presumed to know as well as the master the *general* reputation of a co-servant for care or skill.⁵ The master being liable for negligence in selecting or retaining a negligent or unskilful servant, the declaration should not only set forth an injury resulting from the negligence or unskilfulness of the servant, *but should also allege negligence on the part of the master, either in employing or retaining him*; and a declaration merely alleging an injury received from the carelessness of a co-servant does not set forth a cause of action.⁶

¹ Summersell v. Fish, 117 Mass. 312.

² Fitzpatrick v. New Albany, &c. R. Co., 7 Ind. 436; Leahey v. Mich. Central R. Co., 10 Mich. 199; 1 Redfield on Railways, 520; Sullivan v. Mississippi, &c. R. Co., 11 Iowa, 426; Priestley v. Fowler, 3 M. & W. 1; Abraham v. Reynolds, 5 H. & N. 142; Hutchinson v. York, &c. Ry. Co., 5 Exch. 343; Morgan v. Vale of Neath Ry. Co., L. R. 1 Q. B. 154; Searle v. Lindsay, 11 C. B. n. s. 429; O'Connell v. Baltimore, &c. R. Co., 20 Md. 212; Hard v. Vt. & Canada R. Co., 32 Vt. 473; Weger v. Penn. Central R. Co., 55 Penn. St. 460; Harrison v. Central R. Co., 31 N. J. L. 293; Feltham v. England, L. R. 2 Q. B. 33; Tunney v. Midland Ry. Co., L. R. 1 C. P. 289; Warner v. Erie R. Co., 39 N. Y. 470; Thayer v. St. Louis, &c. R. Co., 22 Ind. 26; Caldwell v. Brown, 53 Penn. St. 457; Beaulieu v. Portland Co., 48 Me. 294; Carle v. Boston, &c. R. Co., 43 Me. 269; Brown v. Maxwell, 6 Hill

(N. Y.), 592; Hayes v. Western R. Co., 3 Cush. (Mass.) 270; Wright v. N. Y. Central R. Co., 25 N. Y. 564.

³ Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; 87 Am. Dec. 635; Farwell v. Boston, &c. R. Co., 4 Met. (Mass.) 48; 38 Am. Dec. 339; Bartonshill Coal Co. v. Reid, 3 Macq. (Sc.) 263.

⁴ Mad River R. Co. v. Barber, 50 Ohio St. 568; Indianapolis R. Co. v. Love, 10 Ind. 554; Faulkner v. Erie R. Co., 49 Barb. (N. Y.) 324; McMillan v. Saratoga, &c. R. Co., 20 id. 442; Hayden v. Smithville Mfg. Co., 29 Conn. 557; Kunz v. Stuart, 1 Daly (N. Y.), 432; Thayer v. St. Louis, &c. R. Co., 22 Ind. 26.

⁵ Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; Frazer v. Penn. R. Co., 38 Penn. St. 104; Laning v. N. Y. Central R. Co., 49 N. Y. 521; 10 Am. Rep. 417.

⁶ Moss v. Pacific R. Co., 49 Mo. 167; 8 Am. Rep. 126.

SEC. 393. Negligence in Hiring or Retaining must be proved. — The servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation or unfitness on the master's part is not shown. Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be *habitual*, rather than occasional, or of such a character as renders it imprudent in the master to retain him in his employ, and such that a prudent man, knowing the facts, would not have retained the servant in his employ.¹ A single act of negligence on the part of a servant may or may not be sufficient to make it obligatory upon the master to discharge him, — according to the character of the act or omission, the nature of the service in which he is employed, and the consequence of negligence to other employes.²

SEC. 394. When Master is affected with Notice of Incompetency. — When a servant is generally known to be incompetent, *the master is chargeable with negligence for not knowing what his reputation is*;³ and if he employs a servant generally reputed to be careless and incompetent, he is chargeable with negligence in his employment, even though he was himself, in fact, ignorant of such unfitness.⁴ But the reputation of the servant in that respect must be so general that it could readily have been ascertained upon inquiry, in which case the negligence consists in not making proper inquiry.⁵ The master is only required to use reasonable diligence in the selection of competent servants, and when he has done that his duty to the servants is performed;⁶ but he must perform this duty reasonably

¹ *Moss v. Pacific R. Co.*, 49 Mo. 167; 8 Am. Rep. 126; *Davis v. Detroit R. Co.*, 20 Mich. 105; *Edwards v. London, & Ry. Co.*, 4 Cl. & F. 530.

² *Baulec v. N. Y. & Harlem R. Co.*, 59 N. Y. 356; *Davis v. Detroit R. Co.*, 20 Mich. 105; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Kroy v. Chicago, & C. R. Co.*, 32 Iowa, 357.

³ *Davis v. Detroit R. Co.*, 20 Mich. 105.

⁴ *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233.

⁵ COOLEY, J., in *Davis v. Detroit R. Co.*, 20 Mich. 105; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 566. In *Noyes v. Smith*, 28 Vt. 63, the court say: "The

master is bound to exercise diligence and care that he brings into his service only such as are safe, capable, and trustworthy; and for any neglect in exercising diligence he is liable to the servant for injuries sustained from that neglect." *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Harper v. Indianapolis R. Co.*, 47 id. 567; *Hutchinson v. York, & Ry. Co.*, 5 Exch. 352.

⁶ *Fox v. Sanford*, 4 Sneed (Tenn.), 36; *Farwell v. Boston, & C. R. Co.*, 4 Met. (Mass.) 47; *Sullivan v. Mississippi, & C. R. Co.*, 11 Iowa, 421; *Beaulieu v. Portland Co.*, 48 Me. 291; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Hubgh v. New Orleans Co.*, 6 La. An. 496; *Columbus, & C. R. Co. v. Troesch*, 68 Ill. 545; *Wonder v.*

and with reasonable reference to the nature of the employment, and the dangers incident to the employment of unskilful or incompetent persons. What is reasonable care in that respect is therefore necessarily a question for the jury.¹

SEC. 395. Rule when Servant knows of Co-servant's Incompetency.

— Where a co-servant is injured through the incompetency of a fellow-servant, and he *knows or has the same means of knowing* of such incompetency as the master has, he cannot recover for injuries resulting to him from such servant's negligent acts, because he is chargeable with negligence in not informing the master, if he knew the fact, or if he did not, is equally as chargeable with negligence as the master for not knowing it;² and if he did know of it, and with such knowledge remained in the service, he is treated as assuming all the risks incident to such incompetency or unskilfulness,³ unless he establishes a reasonable excuse for remaining.⁴ The master is bound to inquire as to the servant's qualification for the service,⁵ and to do all that a prudent man would do under similar circumstances, in view of the nature of the service and the consequences of its careless or improper execution. He cannot screen himself from liability upon the ground that he was deceived by the statements of the servant himself as to his experience or habits, if upon reasonable inquiry he would have ascertained his incompetency or unfitness.⁶ The duty imposed

Baltimore, &c. R. Co., 32 Md. 411; Harper v. Indianapolis R. Co., 47 Mo. 567; Davis v. Detroit, &c. R. Co., 20 Mich. 105; McDermott v. Pacific R. Co., 30 Mo. 115; Hunt v. Chicago, &c. R. Co., 26 Iowa, 363; Columbus R. Co. v. Webb, 12 Ohio St. 475; Michigan, &c. R. Co. v. Leahey, 10 Mich. 199; Ponton v. Wilmington R. Co., 6 Jones (N. C.), 245; Illinois R. Co. v. Cox, 21 Ill. 20; Cooper v. Mullins, 30 Ga. 146; Conlin v. Charleston, 15 Rich. (S. C.) 201; Donaldson v. Mississippi, &c. R. Co., 18 Iowa, 280; Wright v. N. Y. Central R. Co., 25 N. Y. 562; Chapman v. Erie R. Co., 55 id.; Noyes v. Smith, 28 Vt. 59.

¹ Davis v. Detroit R. Co., 20 Mich. 105; Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; 87 Am. Dec. 635; Gibbs v. Crombie, 3 Ct. of Sess. (Sc.) (3d series), 886. See statement of case, *ante*.

² Davis v. Detroit R. Co., 20 Mich. 105; Lalor v. Chicago, &c. R. Co., 52 Ill. 401; Chicago, &c. R. Co. v. Murphy, 53 id. 336.

³ Mad River R. Co. v. Barber, 5 Ohio St. 563; Hayden v. Mfg. Co., 29 Conn. 559; Skipp v. Eastern Counties Ry. Co., 9 Exch. 223; Wright v. N. Y. Central R. Co., 25 N. Y. 566; Frazier v. Pennsylvania R. Co., 38 Penn. St. 104; 80 Am. Dec. 467; Seymour v. Maddox, 16 Q. B. 324.

⁴ Laning v. N. Y. Central R. Co., 49 N. Y. 521; Clarke v. Holmes, 7 H. & N. 937.

⁵ Noyes v. Smith, 28 Vt. 59; Harper v. Indianapolis, &c. R. Co., 47 Mo. 567; 4 Am. Rep. 352.

⁶ Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; Wright v. N. Y. Central R. Co., 28 Barb. (N. Y.) 80. The judgment in this case was reversed upon appeal (25 N. Y. 562), but by later decisions in the Court of Appeals its doctrine has been affirmed, while that announced in the Appellate Court has been overruled. Laning v. N. Y. Central R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Flike v. Boston,

upon the master in this respect is substantial and absolute. *He must at his peril exercise reasonable care in the selection of the appliances of his business and co-servants*, and whether he has done so or not is essentially a question for the jury;¹ and the rule is the same whether he discharges this duty himself or delegates it to others.²

SEC. 396. Incompetency of the Servant, and Negligence of the Master must be Shown. — Where a servant is injured or killed while in the employ of his master, by an accident resulting from the habitual negligence of a fellow-servant, known to and acquiesced in by the master, the master is not liable to an action by the servant or his representatives, if the servant has, by his own negligence at the time, *in knowing and disregarding the danger*, contributed to the accident. But if there is no contributory negligence by the servant, the master is liable.³ The rule applies only where the injury happened without any actual fault of the principal or master, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it happens.⁴

SEC. 397. Difference in Grade or Class of Service does not affect the Relation of Fellow-service. — The fact that the servants were engaged in separate and distinct branches of service does not render the master liable; *all* who are engaged in the same common service, from the highest to the lowest, and who are subject to the same *general control*, are fellow-servants within the rule.⁵ In a very large

&c. R. Co., 53 N. Y. 549; 13 Am. Rep. 545; Alabama, &c. R. Co. v. Waller, 48 Ala. 457; New Orleans R. Co. v. Hughes, 49 Miss. 258.

¹ Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; 87 Am. Dec. 635.

² Wright v. N. Y. Central R. Co., 28 Barb. (N. Y.) 80; Laning v. N. Y. Central R. Co., 49 N. Y. 521; Walker v. Bolling, 22 Ala. 294; Grizzle v. Frost, 3 F. & F. 622.

³ Senior v. Ward, 1 El. & El. 385; 102 E. C. L. 385; Brother v. Cartter, 52 Mo. 372; Columbus, &c. R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 578; Honner v. Ill. Central R. Co., 15 Ill. 550; Ill. Central R. Co. v. Cox, 21 Ill. 24; Chicago, &c. R. Co. v. Keefe, 47 Ill. 108; Same v. Murphy, 53 Ill. 336; Chicago, &c. R. Co. v. Gregory, 58 Ill. 372; Wright v. N. Y. Central R. Co., 25 N. Y. 562; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Noyes v. Smith, 28 Vt. 56; Lalor v. Chicago, &c. R. Co.,

52 Ill. 401; 4 Am. Rep. 616; Gilman v. Eastern R. Co., 10 Allen (Mass.), 238; Hard v. Vt. & Canada R. Co., 32 Vt. 473; Beaulieu v. Portland Co., 48 Me. 295; Feltham v. England, L. R. 2 Q. B. 33; Moss v. Pacific R. Co., 49 Mo. 167; Harper v. Indianapolis, &c. R. Co., 47 Mo. 567; Gillshannon v. Stony Brook R. Co., 10 Cush. (Mass.) 228; Brydon v. Stewart, 2 Macq. (Sc.) 30; Patterson v. Wallace, 1 id. 757; Brothers v. Cartter, 52 Mo. 373; 14 Am. Rep. 424; Haskin v. N. Y. Central R. Co., 65 Barb. (N. Y.) 129.

⁴ McMillan v. Saratoga, &c. R. Co., 20 Barb. (N. Y.) 449; Keegan v. Western R. Co., 8 N. Y. 175.

⁵ Kansas Pacific R. Co. v. Salmon, 11 Kan. 83; Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71; Columbus, &c. R. Co. v. Arnold, 31 Ind. 174; Washburn v. Nashville, &c. R. Co., 3 Head (Tenn.), 638; Manyville v. Cleveland, &c. R. Co.,

number of cases a limitation has been applied to the general doctrine of non-recovery for injuries incurred through the negligence of a fellow-servant, by setting up the principle that there is a class of servants who are vice-principals, who stand in the place of and represent the company, and who cannot be said to be fellow-servants of those of inferior rank. Thus, in a very strongly contested case before the Federal Supreme Court,¹ it was held that the conductor of a train, having power to command its movements, to direct the servants and employes operating it, and to exercise a general control over it, is not a fellow-servant with such servants and employes; that in the discharge of his duties as conductor he represents the company, and is a vice-principal rather than a servant. This vice-principal limitation to the general doctrine has been followed in a large number of jurisdictions where it is now considered as the settled law.² On the other hand, an equally large and probably more influential class of authorities repudiate the limitation as entirely wrong in principle and as tending to produce confusion;³ these authorities uphold the principle stated in the first sentence of this section, which appears to us to be unquestion-

11 Ohio St. 417; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228; *Ryan v. Cumberland Valley R. Co.*, 23 Penn. St. 384; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *reversing*, 5 Duer (N. Y.), 39; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; *Seaver v. Boston, &c. R. Co.*, 14 Gray (Mass.), 466.

¹ *Chicago, &c. R. Co. v. Ross*, 112 U. S. 377; 17 Am. & Eng. R. Cas. 501. The court was divided, however, and the above conclusion was dissented from by four of the nine judges. Text-writers have generally criticised it severely, and some have expressed the opinion that it would not be followed should the question again be presented. See McKinney on Fellow-Servants, 7 Am. & Eng. Ency. Law, 840.

² *Chicago, &c. R. Co. v. Ross*, 112 U. S. 377; 17 Am. & Eng. R. Cas. 501; *Gravelle v. Minneapolis, &c. R. Co.*, 3 McCrary (U. S.), 352; *Mason v. Edison Machine Works*, 28 Fed. Rep. 228; *Walker v. Balling*, 22 Ala. 294; *Colorado Midland R. Co. v. O'Brien*, 16 Col. 219; *Same v. Naylor*, 17 Col. 501; *Atlanta Cotton Factory v. Speer*, 69 Ga. 137;

Chicago, &c. R. Co. v. May, 108 Ill. 288; 15 Am. & Eng. R. Cas. 320; *Cooper v. Iowa Central R. Co.*, 44 Iowa, 134; *Kansas, &c. R. Co. v. Little*, 19 Kan. 267; *Harper v. Indianapolis, &c. R. Co.*, 47 Mo. 562; *Hoke v. St. Louis, &c. R. Co.*, 88 Mo. 360. *Ashman v. Flint, &c. R. Co. (Mich.)*, 53 Am. & Eng. R. Cas. 80; *Cowles v. Richmond, &c. R. Co.*, 84 N. C. 309; *Lake Shore, &c. R. Co. v. Lavalley*, 36 Ohio St. 221; *East Tenn., &c. R. Co. v. Collins*, 85 Tenn. 227; *Moon v. Richmond, &c. R. Co.*, 78 Va. 745; *Criswell v. Pittsburgh, &c. R. Co.*, 30 W. Va. 818; *Gravell v. Minneapolis, &c. R. Co.*, 3 McCrary (U. S.), 352. See the authorities collected in 7 Am. & Eng. Ency. Law, p. 839.

³ *Brick v. Rochester, &c. R. Co.*, 98 N. Y. 511; *Blake v. Maine Central R. Co.*, 70 Me. 60; *Keystone Bridge Co. v. Newberry*, 96 Penn. St. 246; 42 Am. Rep. 573; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *O'Connell v. Baltimore, &c. R. Co.*, 20 Md. 212; *Fraker v. St. Paul, &c. R. Co.*, 32 Minn. 54. Compare *Justice v. Pennsylvania R. Co.*, 130 Ind. 321; 53 Am. & Eng. R. Cas. 604.

ably the better rule. But as a matter of course where the alleged vice-principal is at the time of the accident engaged in the performance of a duty owing by the master to his servants, the negligent performance of which is the cause of the injury, the exemption under the fellow-servant rule cannot apply.

In some of the States it is held that servants are not to be treated as fellow-servants unless they are subject to the same *immediate control*, and engaged in the same department of labor.¹ Where two servants of a common master are employed upon the same work, and one of them, without authority from his employer, directs the other to use a machine for a dangerous and improper purpose, for which it was not intended or provided, and he complies, and thereby receives an injury, the employer will not be held liable;² but if such person had authority to direct such servant, the rule is otherwise.³

SEC. 398. When Machinery is Defective, but Promoting Cause of Injury is Negligence of Co-servant. — Where the proximate cause of the injury is the negligence of a co-servant, no recovery can be had even though it results from the use by them of machinery which, unless used in a particular manner, is unsafe, nor even though appliances might be provided that would be safe without such careful use by the servant.⁴ But, on the other hand, the master is not

¹ Railroad Co. v. Fort, 17 Wall. (U. S.) 559; Flike v. Boston, &c. R. Co., 53 N. Y. 549; Morgan v. Vale of Neath Railway Co., L. R. 1 Q. B. 149; Feltham v. England, L. R. 2 Q. B. 33; Columbus, &c. R. Co. v. Arnold, 31 Ind. 174; Lawler v. Androscoggin R. Co., 62 Me. 463; Wonder v. Baltimore, &c. R. Co., 32 Md. 411; 3 Am. Rep. 143; Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573; Laning v. N. Y. Central R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Chapman v. Erie R. Co., 55 N. Y. 579.

² Railroad Co. v. Fort, 17 Wall. (U. S.) 553; Ryan v. Chicago, &c. R. Co., 60 Ill. 171; Nashville, &c. R. Co. v. Carroll, 6 Heisk. (Tenn.) 347.

³ Chicago, &c. R. Co. v. Harney, 28 Ind. 23; Ford v. Fitchburg R. Co., 110 Mass. 240; Siegel v. Schantz, 2 Th. & C. (N. Y.) 253; Grizzle v. Frost, 3 F. & F. 322; Murphy v. Smith, 19 C. B. n. s. 361; Laning v. N. Y. Central R. Co., 49 N. Y. 521; 10 Am. Rep. 417.

⁴ Allen v. The New Gas Co., 1 Ex. Div. 251; Fowler v. Chicago, &c. R. Co., 61 Wis. 159; 17 Am. & Eng. R. Cas. 536; Pease v. Chicago, &c. R. Co., 61 Wis. 163; 17 Am. & Eng. R. Cas. 527; Killea v. Foxon, 125 Mass. 485; Bartonshill Coal Co. v. Reid, 3 Macq. 266; Lovegrove v. London, &c. Ry. Co., 16 C. B. n. s. 692; 111 E. C. L. 689; Cotton v. Wood, 8 C. B. n. s. 568; 98 E. C. L. 568; Feltham v. England, L. R. 2 Q. B. 33. In Howell v. Landore Siemens Steel Co., L. R. 10 Q. B. 62, the plaintiff brought an action for injuries resulting in the death of John Howell, a servant of the defendants, by the explosion of firedamp. Howell was at work in the defendant's mine, under the control of one Thomas, as manager. The explosion occurred, as the jury found, by the failure of Thomas to withdraw the men after noxious gas had been found to prevail in the mine. It was held that Thomas was a co-servant with Howell, and that the defendants consequently were not liable.

exonerated from liability by the mere fact that the negligence of a fellow-servant of the injured employé concurred with his own breach of duty in causing the injury; in such a case the general rule prevails that either of the two concurred causes may be held responsible.¹ Where the facts involved leave it doubtful as to which of two such causes was the proximate cause, or whether they both contributed equally to cause the injury, the question must be submitted to the jury in accordance with the rules stated in a previous connection.²

SEC. 399. Status of Persons Volunteering Assistance. — A construction-train of the defendant company in charge of a conductor, having pulled into a station, the conductor temporarily left it to attend to his usual duties at the station, leaving the trainmen to do some switching, — one of the brakemen, known as the “head-brakeman,” having charge of the switching movements of the train. At the request of this “head-brakeman” the plaintiff, a bystander at the station and a former employé of the road, got on the cars to assist in the switching, and while doing so sustained injuries caused by the movement of certain car-trucks which were loaded on one of the cars, and which had not been properly blocked. In an action for damages for these injuries the court held that the “head-brakeman” had no authority to employ additional men to aid in the switching; the fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; if any one had such authority, it was the conductor who had the train in charge. This being true, the plaintiff was

Memphis, &c. R. Co. v. Thomas, 51 Miss. 637; *New Orleans, &c. R. Co. v. Hughes*, 49 id. 258; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; *Farwell v. Boston, &c. R. Co.*, 4 Met. (Mass.) 49; *King v. Boston, &c. R. Co.*, 9 Cush. (Mass.) 112; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270.

¹ *Grand Trunk, &c. R. Co. v. Cummings*, 106 U. S. 700; 11 Am. & Eng. R. Cas. 254; *Perry v. Ricketts*, 55 Ill. 234; *Chicago, &c. R. Co. v. Jackson*, 55 Ill. 495; *Cone v. Delaware, &c. R. Co.*, 81 N. Y. 206; 37 Am. Rep. 491; 2 Am. & Eng. R. Cas. 57; *Ellis v. New York, &c. R. Co.*, 95 N. Y. 246; 17 Am. & Eng. R. Cas. 641; *Atchison, &c. R. Co. v. Holt*, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206; *Hannibal, &c. R. Co. v. Fox*, 31 Kan.

586; 15 Am. & Eng. R. Cas. 325; *Elmer v. Locke*, 135 Mass. 575; 15 Am. & Eng. R. Cas. 300. *Hullehan v. Green Bay, &c. R. Co.*, 68 Wis. 520; 31 Am. & Eng. R. Cas. 332. See 7 Am. & Eng. Ency. Law, p. 828.

² *Lilly v. N. Y. Central R. Co.*, 107 N. Y. 563. In this case the injured employé was put in a dangerous position through the negligence of his fellow-servant, but it appeared that no danger would have resulted had the brake been in good order. The court held that it was error to non-suit the plaintiff, that the circumstances presented a case for the jury as to whether the defect in the brake was chargeable to the company as negligence. See also *Ellis v. New York, &c. R. Co.*, 95 U. S. 246; 17 Am. & Eng. R. Cas. 641.

a mere volunteer, and assumed all the risks of the situation; the relation of master and servant did not exist, and the defendant company owed plaintiff no duty as master. Recovery was therefore refused.¹ There is good authority for the view that where a regular brakeman is absent, and the safe and proper management of the train so requires, the conductor in charge has authority to supply the place of the absent brakeman by the employment of an additional hand.² And if any sudden or unexpected emergency should rise such that the safety of the train demanded an extra force of brakemen, it would be clearly within the implied authority of the conductor to employ them.³

But where the injured party, with the permission of the agent of the railroad company, engages in an undertaking as much to the interest of himself or his master as to the company, then, while the relation of master and servant does not exist between the company and himself, yet he is entitled to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. Though performing a service in such an instance beneficial to both, he is doing so in his own behalf, and the fact that he acts in his own behalf, however beneficial his labor may be to the company, gives him the right to be protected against the negligence of the company's servants.⁴ Thus, where the owner of freight transported by a railroad company is allowed to

¹ *Church v. Chicago, &c. R. Co.* (Minn.), 52 N. W. Rep. 647; *Mayton v. Texas, &c. R. Co.*, 63 Tex. 77; 51 Am. Rep. 637; *New Orleans, &c. R. Co. v. Harrison*, 48 Miss. 112; *Flower v. Pennsylvania R. Co.*, 69 Penn. St. 210; 8 Am. Rep. 251; *Sherman v. Railroad Co.*, 72 Mo. 62; *Sparks v. East Tenn. R. Co.*, 82 Ga. 156; *Rhodes v. Central R., &c. Co.*, 84 Ga. 320; *Everhart v. Terre Haute, &c. R. Co.*, 78 Ind. 292; 41 Am. Rep. 567; *Atchison, &c. R. Co. v. Lindley*, 42 Kan. 714. See also *Osborne v. Knox, &c. R. Co.*, 68 Me. 49.

² *Sloan v. Cent. Iowa R. Co.*, 62 Iowa, 728; 11 Am. & Eng. R. Cas. 145; *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518; 38 Am. & Eng. R. Cas. 11. In *Central Trust Co. v. Texas, &c. R. Co.*, 32 Fed. Rep. 448, one who was injured while assisting as brakeman in making up a train, doing so at the request of the yard-master, but without pay, was allowed to recover on

the ground that it was within the scope of the yard-master's authority to employ additional help when necessary, and that his request, therefore, created between the company and the volunteer the relation of master and servant.

³ *Church v. Chicago, &c. R. Co.* (Minn.), 52 N. W. Rep. 647.

⁴ 2 *Thompson on Neg.*, 1045; *Eason v. S. & E. T. R. Co.*, 65 Tex. 578; 57 Am. Rep. 606. In this latter case the plaintiff, being in the employ of parties shipping lumber, was at the station to attend to the loading of some lumber, and was requested by the conductor of the train to couple some cars in order to facilitate the loading, the force of brakemen on the train being insufficient. Plaintiff having been injured in the attempt to make the coupling, it was held, following the principle of the text, that the company was liable. See also *Orman v. Hayes*, 60 Tex. 180.

assist in its unloading and delivery, and in so doing he is injured through the negligence of the company's servants, he can recover damages of the company.¹ Another class of cases coming under this head, and in which recovery may be had, are those in which a street-car which has run off the track is being put back on, and the assistance of the passengers is requested.² The same is true where a passenger voluntarily assists the driver and conductor in backing the car on to a switch so as to enable a car going in the opposite direction to pass.³ These latter cases are also supportable on the ground that the case was one of an emergency in which a conductor would have authority to request assistance.

SEC. 399 *a*. **Where Offending Servant represents the Master.** — The rule does not admit of intelligent question that the master is bound to furnish safe machinery and appliances, and that if he delegates this duty to another he is responsible to any servant injured through the negligence of the person to whom this duty has been intrusted. The same is true where the master delegates to another the performance of his duty to maintain such appliances and machinery in proper repair, to detect and to remedy defects.⁴ It follows therefore that any person to whom the master has intrusted the performance of the duties which he owes to his servants, is not a fellow-servant with such servants, but is a representative of the master.⁵ The test

¹ *Holmes v. Northeastern R. Co.*, L. R. 4 Exch. 254; 6 Exch. 123; *Wright v. London, &c. R. Co.*, 1 Q. B. D. 252; 16 Moak's Rep. 314.

² *McIntyre St. R. Co. v. Bolton*, 43 Ohio St. 224; 54 Am. Rep. 803; 21 Am. & Eng. R. Cas. 502. See *Chicago, &c. R. Co. v. Young*, 62 Ill. 238; *Stastney v. Second Avenue R. Co.*, 18 N. Y. Supp. 800; *Cleveland, &c. R. Co. v. Spier*, 16 C. B. n. s. 398; 111 E. C. L. 398; *Althorp v. Wolf*, 22 N. Y. 355.

³ *McIntyre Ry. Co. v. Bolton*, 43 Ohio St. 224; 21 Am. & Eng. R. Cas. 501.

⁴ *Northern Pac. R. Co. v. Herbert*, 116 U. S. 648; 24 Am. & Eng. R. Cas. 407; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; 44 Am. Rep. 573; *Snow v. Housatonic, &c. R. Co.*, 3 Allen (Mass.), 447; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Mullan v. Philadelphia, &c. S. S. Co.*, 78 Penn. St. 25; *Flike v. Boston, &c. R. Co.*, 53 N. Y. 549; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; 5 Am. & Eng. R.

Cas. 564; *Fuller v. Jewett*, 80 N. Y. 46; 36 Am. Rep. 575; *Crispin v. Babbitt*, 81 N. Y. 516; *Hannibal, &c. R. Co. v. Fox*, 31 Kan. 586; 15 Am. & Eng. R. Cas. 325; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Houston, &c. R. Co. v. Rider*, 62 Tex. 267. In the case of *Brann v. Chicago, &c. R. Co.*, 53 Iowa, 595; 36 Am. Rep. 243, the company was held liable for the negligence of its car-inspector, by reason of which a brakeman was injured. After laying down the rule that the company was bound not only to provide suitable machinery, etc., but also to see that it was kept in repair, the court observed: "As the corporation must act through its agents and employes, the negligence of the employes upon whom the duty of inspection is devolved is the negligence of the corporation."

⁵ *Indiana Car Co. v. Parker*, 100 Ind. 191; *Beeson v. Green Mountain Co.*, 57 Cal. 20.

as to whether an employé is the representative of the master is not whether he has the power to employ or discharge hands, or to purchase or change machinery; for while these are some of the duties of the master they are not all, and one who is not intrusted with either of these powers may still be the representative of the master. *The true and only test is whether he is employed to do any of the duties of the master*; if so, then his negligence in the discharge of such duties is the negligence of the master, and affords a ground of recovery to any servant injured in consequence of it.¹ Or, as stated by an eminent authority on this branch of the law, "The true rule for determining who are fellow-servants is to be determined not from the grade or rank of the offending or injured servants, but is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employé is not a servant, but an agent; but as to all other acts they are fellow-servants."²

A common application of these principles is seen in the cases which hold the master liable for injuries to his servants resulting from the negligence of those to whom he has intrusted the duty of inspecting cars. While there are some cases which maintain a different doctrine,³ authority and principle favor the view that car-

¹ *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; 44 Am. Rep. 573; *Atchison, & C. R. Co. v. Moore*, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; *Slater v. Jewett*, 85 N. Y. 74; *Willis v. Oregon R. Co.*, 11 Ore. 257; 17 Am. & Eng. R. Cas. 543; *Capper v. Louisville, & C. R. Co.*, 103 Ind. 305; 21 Am. & Eng. R. Cas. 525; *Fuller v. Jewett*, 80 N. Y. 52; *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Flike v. Boston, & C. R. Co.*, 53 N. Y. 549, 553; 13 Am. Rep. 545.

² W. M. McKinney, in the article "*Fellow-Servants*," in Vol. 7 of Am. & Eng. Ency. of Law, p. 834. In support of this see *Crispin v. Babbitt*, 81 N. Y. 520; *Atchison, & C. R. Co. v. Moore*, 29 Kan. 632; 11 Am. & Eng. R. Cas. 244.

³ See *Gibson v. Northern Central R. Co.*, 22 Hun (N. Y.), 289. The case of *Nashville, & C. R. Co. v. Foster*, 10 Lea (Tenn.), 351; 11 Am. & Eng. R. Cas. 180, sometimes cited as opposing the view of the text, was a decision upon the law of Alabama, and depended upon a variety of

facts; it does not appear that there is anything in it conflicting with the rule of the text. Still there are a number of cases which hold that a brakeman and a car-inspector are fellow-servants. Thus, in *Smith v. Potter, Receiver*, 46 Mich. 258, 41 Am. Rep. 101, where a brakeman in making a coupling was injured by a loosened deadwood on a car which had come from another road, the court held that he could not recover though the car-inspector ought to have discovered the defect. See this case overruled, however, in Mich. See also *Little Miami, & C. R. Co. v. Fitzpatrick*, 42 Ohio St. 318; *St. Louis, & C. R. Co. v. Gaines*, 46 Ark. 555; *Smoot v. Mobile, & C. R. Co.*, 67 Ala. 13. The case of *Kidwell v. Houston, & C. R. Co.*, 3 Woods (U. S. Dist. Ct. West. Dist. of Tex.), 313, is certainly a harsh and incorrect one. An employé injured through a defect in a car was denied recovery although he had given notice of the defect to the car-inspector and to the master-mechanic, the court holding that the negligence of these

inspectors, in regard to their duty to inspect and examine, are the representatives of the company, and are not fellow-servants with employes using the cars or appliances which it was the inspector's duty to examine.¹ The company cannot avoid its duty of inspection, or other duties owing to its employes, by intrusting their performance to its agents, and then set up the doctrine of fellow-service when, through the neglect of such agents, an employe is injured. To allow such an extension of the doctrine would lead to the absurd conclusion that the company is free from all liability, since a corporation can only act through its agents.² The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him.³ In a case in Pennsylvania, which was

servants was the proximate cause of the injury, and they, being fellow-servants of plaintiff, no recovery could be had.

¹ *Brann v. Chicago, &c. R. Co.*, 53 Iowa, 595; 36 Am. Rep. 243; *Ohio, &c. R. Co. v. Percy*, 128 Ind. 197; *Tierney v. Minneapolis, &c. R. Co.*, 33 Minn. 311; 21 Am. & Eng. R. Cas. 545; *King v. Ohio, &c. R. Co.*, 11 Biss. (U. S.) 362; 14 Fed. Rep. 277; 8 Am. & Eng. R. Cas. 119; *Chicago, &c. R. Co. v. Hoyt*, 122 Ill. 369; 31 Am. & Eng. R. Cas. 309; *Macy v. St. Paul, &c. R. Co.*, 35 Minn. 200; *Indianapolis, &c. R. Co. v. Morganstern*, 106 Ill. 216; *Fay v. Minneapolis, &c. R. Co.*, 30 Minn. 231; 11 Am. & Eng. R. Cas. 193; *Missouri, &c. R. Co. v. Condon*, 78 Mo. 567; 17 Am. & Eng. R. Cas. 583; *Chicago, &c. R. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Missouri Pac. R. Co. v. Dwyer*, 26 Kan. 58; *Dewey v. Detroit, &c. R. Co.* (Mich.), 52 N. W. Rep. 942; *Morton v. Detroit, &c. R. Co.* (Mich.), 46 N. W. Rep. 111; *Daniels v. Un. Pac. R. Co.* (Utah), 23 Pac. Rep. 762; *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315. In the case of *Atchison, &c. R. Co. v. Moore*, 29 Kan. 645, the court, after stating the duty of the master to furnish safe machinery and appliances, went on to say: "Applying these principles to railroad companies and to the present case, we would think that a railroad company would be liable to any one of its servants

operating its road for the negligence of any other one of its servants whose duty it was to keep the road in good condition, and who culpably failed to perform such duty, or to give proper warning; for in such a case the two classes of servants would not be fellow-servants or co-employes, but the latter class would really be the representative of the master, the railroad company, and the failure of the servant would be in the line of his duty."

² *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 447; *Pautz v. Iron Co.*, 99 N. Y. 368; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Flike v. Boston, &c. R. Co.*, 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Beeson v. Green Mountain Min. Co.*, 57 Cal. 20. In the first of these cases the servant was injured while making a coupling, owing to the defective condition of the track, and the court held that he could recover; that it could not be set up in defence that the condition of the track resulted from the negligence of the company's inspector. See also *Carlson v. Oregon, &c. R. Co.*, 21 Oreg. 450; *Wabash, &c. R. Co. v. McDaniels*, 107 U. S. 454; 11 Am. & Eng. R. Cas. 158; *Mitchell v. Robinson*, 80 Ind. 281; *Ohio, &c. R. Co. v. Collarn*, 73 Ind. 261.

³ *Northern Pacific R. Co. v. Herbert*, 116 U. S. 648; 24 Am. & Eng. R. Cas. 407. In that case a yard-brakeman was injured by reason of a defective brake.

an action for the death of an engineer and a fireman caused by the explosion of the engine boiler, it appeared that the locomotive had a short time prior to the explosion been in the repair-shops of the company where it had been insufficiently repaired. The court held that the company was liable, that it could not defend on the ground that the deceased and the servant in the repair-shop whose negligence caused the defect were fellow-servants.¹

In a recent case before the Supreme Court of Michigan,² the

The court, in upholding a verdict in his favor and stating the rule of the text, went on to say: "This rule was substantially declared in the recent case of *Hough v. Railroad Co.*, 100 U. S. 213, 218, where we said that, notwithstanding a railroad corporation may be controlled by competent, watchful, and prudent directors, and care and caution are exercised in the selection of subordinates at the head of the several branches of its service, its obligation still remains to provide and maintain in a suitable condition the machinery and apparatus to be used by its employés; and that it 'cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.'" These views are also upheld in *Flike v. Boston, &c. R. Co.*, 53 N. Y. 549; *Fuller v. Jewett*, 80 N. Y. 46; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Bessex v. Chicago, &c. R. Co.*, 45 Wis. 477, 481.

Though the doctrine of the text appears eminently just and reasonable, and has the support of authority, it has been denied by the Massachusetts court in a case in which they hold that the company is not liable for an injury to one of its brakemen who is injured by reason of a defective brake on a car belonging to another company, where a competent inspector has been employed who neglected to inspect the car in question. The inspector was considered to be a fellow-servant of the injured brakeman. *Mackin v. Boston, &c. R. Co.*, 135 Mass. 201. Compare *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; *Tierney v. Minneapolis, &c. R. Co.*, 33 Minn. 311; 21 Am. & Eng. R. Cas. 545. The Mackin

case, just cited (135 Mass. 201), was affected by the fact that the defective car was not the property of the defendant company and not in actual use for transportation when the injury occurred. In so far as it opposes the rule of the text, it is clearly opposed to the better authority, particularly to the case of *Snow v. Housatonic R. Co.* (8 Allen, 447), which has everywhere been accepted as stating the correct doctrine. There are, however, a number of cases which hold that the company discharges its duty by the employment of competent inspectors. These cases proceed on the ground that the master does not warrant the safety of the appliances, but is bound only to exercise reasonable care to secure that end, and this duty of reasonable care is satisfied by the employment of competent and skilful inspectors with power to inspect all cars, etc., and to have all necessary repairs made. *Columbus, &c. R. Co. v. Webb*, 12 Ohio St. 475, 494; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318; *Smith v. Flint, &c. R. Co.*, 46 Mich. 258; *Smoot v. Mobile, &c. R. Co.*, 67 Ala. 13.

¹ *Pennsylvania, &c. R. Co. v. Mason*, 109 Penn. St. 296. The trial court had charged the jury that the master was bound to keep and maintain the machinery in such condition as to be "reasonably and adequately safe" for the deceased to use; held no error.

² *Dewey v. Detroit, &c. R. Co.* (Mich.), 53 Am. & Eng. R. Cas. 550, overruling *Smith v. Potter*, 46 Mich. 258; 2 Am. & Eng. R. Cas. 140. In a note to the Dewey case (53 Am. & Eng. R. Cas. 555) the editor, Mr. McKinney, observes: "The above decision is undoubtedly sound. The authorities are about evenly divided on the subject whether a railroad company

doctrine just stated has received unqualified approbation. In that case a brakeman in coupling cars was injured owing to the negligence of an inspector in allowing a flat car to be so loaded with lumber that the lumber projected beyond the end of the car. The court, overruling a former decision, held that the negligence of the inspector was that of the master, and that the company could not defend on the ground that he was a fellow-servant with the injured brakeman. It was further held that the fact that the improperly loaded cars had been received in that condition from a connecting line would not relieve the company from liability, even though the duty to receive cars from connecting lines was one imposed by statute.¹

is liable for the negligence of car inspectors and repairers causing injury to other employés, but it is certain that according to the true criterion of fellow-service, these employés are representatives of the master and not fellow-servants." See, also, note in 38 Am. & Eng. R. Cas. 172.

¹ *Dewey v. Detroit, &c. R. Co.* (Mich.), 53 Am. & Eng. R. Cas. 550; *Railroad Co. v. Herbert*, 116 U. S. 652; 24 Am. & Eng. R. Cas. 407. Compare *Ala. Great So. R. Co. v. Carroll* (Ala.), 53 Am. & Eng. R. Cas. 556.

CHAPTER XXV.

BAGGAGE.

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| <p>SEC. 400. Liable for, as Common Carriers.</p> <p>401. What is Personal Baggage.</p> <p>402. When Liability for, Ceases.</p> <p>403. Baggage-checks, Effect of.</p> <p>404. Rule as to Liability before Baggage is checked.</p> | <p>SEC. 405. Passengers must call for Baggage within a Reasonable Time.</p> <p>406. Right to Limit Amount of Baggage and Liability therefor.</p> <p>407. When Baggage is received by Carrier through Mistake.</p> <p>408. Merchandise, etc.</p> |
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SEC. 400. **Liable for, as Common Carriers.**—Common carriers not being insurers of the safety of their passengers, it was formerly held that they could not be treated as common carriers of a passenger's baggage, unless a distinct price was paid therefor.¹ But the modern rule holds them chargeable as common carriers of such luggage, whether a distinct price is paid therefor or not.² The carrier, however, is only liable for such luggage as is given into his custody and possession by the passenger.³

A carrier of passengers, by the sale of a passenger-ticket, as incident to the contract, without any specific agreement or separate

¹ *Middleton v. Fowler*, 1 Salk. 282; *Wolf v. Summers*, 2 Camp. 631; *Upshare v. Aidee*, 1 Comyn, 25.

² *Woods v. Davin*, 13 Ill. 746; *Bomor v. Maxwell*, 9 Humph. (Tenn.) 621; *Orange Co. Bank v. Brown*, 9 Wend. 75; *Oakes v. Northern Pac. R. Co.*, 20 Oreg. 392; *Prixatti v. McLaughlin*, 1 Strob. (S. C.) 468; *Williams v. Great Western Ry. Co.*, 10 Exch. 15; *Marshall v. York, &c. Ry. Co.*, 11 C. B. 655; *Richards v. London, &c. Ry. Co.*, 7 C. B. 839; *Butcher v. London, &c. R. Co.*, 16 C. B. 13 (in this case there was evidence of negligence upon the part of the company's servants); *Midland Ry. Co. v. Bromley*, 17 C. B. 372; *Le Conteur v. London, &c. Ry. Co.*, L. R. 1 Q. B. 54, 59; *Powell v. Myers*, 26 Wend. 591; *Walsh v. The H. M. Wright*, 1 Newb. 494; *Holdridge v. Utica, & R. Co.*, 56 Barb. 191; *Gore v. Norwich, &c. Transp.*

R. Co., 2 Daly (N. Y.), 254; *Camden, &c. R. Co. v. Belknap*, 21 Wend. 354; *Blanchard v. Isaacs*, 3 Barb. 388; *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 386; 41 Am. Dec. 767. For a peculiar case of liability, see *McCormick v. Pennsylvania R. Co.*, 99 N. Y. 65, *distinguishing* same case on former hearing, 80 N. Y. 353.

³ *Tower v. Utica R. Co.*, 7 Hill (N. Y.), 47; *Kinsley v. Lake Shore, &c. R. Co.*, 125 Mass. 54; *post*, § 402. But in England it has been held that the carrier is in point of law in the custody of a passenger's baggage, although it has not been delivered to any servant of the company, so as to render it liable for its loss. *Le Conteur v. London, &c. Ry. Co.*, L. R. 1 Q. B. 54; *-Gt. Northern Ry. Co. v. Shepherd*, 8 Exch. 30; *Robinson v. Dunmore*, 2 B. & P. 416.

compensation, becomes obligated to carry the baggage of the passenger to a reasonable amount, and to deliver it at the end of the route to the passenger or his duly authorized agent.¹

SEC. 401. **What is Personal Baggage.** — Of course a carrier of passengers is only required to carry a reasonable amount of baggage, and may restrict the amount to be carried for any one passenger, and may also refuse to carry anything as baggage except the passenger's ordinary personal luggage.² It is not always easy, however, to determine what is a passenger's ordinary personal luggage, for which the carrier is liable; but the better opinion seems to be that it comprises only such articles as a traveller usually carries with him for his comfort and convenience, both during the journey³ and during his stay at the place of his destination.⁴ This embraces all kinds of clothing for himself and family who travel with him, as well as articles of jewelry and personal adornment.⁵ The question as to what constitutes articles of personal convenience has been variously decided, and depends largely upon the habits, manners, and customs of the people in the section of country in which the question arises, as well as the profession, rank, and condition of the passenger, the length of the journey, and the purposes for which it was undertaken. A person undertaking a *long* journey requires more articles for his personal convenience than one undertaking a short one; and while a person undertaking a journey of only a few miles is entitled to put in his baggage a sum of money sufficient to defray the reasonable expenses of his journey, yet he would

¹ *Isaacson v. N. Y. Central R. Co.*, 94 N. Y. 278; *Norfolk, &c. R. Co. v. Irvine*, 84 Va. 553. And the company's liability is not affected by the fact that the passenger travels on a free pass. *McGill v. Rowland*, 3 Penn. St. 451; 45 Am. Dec. 654; *Malone v. Boston, &c. R. Co.*, 12 Gray (Mass.), 588; *Rice v. Illinois Central R. Co.*, 22 Ill. App. 643.

² *Mytton v. Midland Ry. Co.*, 28 L. J. Exch. 385; *Phelps v. London, &c. Ry. Co.*, 19 C. B. N. S. 321; *post*, § 406.

³ *Merrill v. Grinnell*, 30 N. Y. 594; *Johnson v. Stone*, 11 Humph. (Tenn.) 419; *Whitmore v. Steamer Caroline*, 20 Mo. 518; *Dibble v. Brown*, 12 Ga. 217; *Shepherd v. Gt. Northern Ry. Co.*, 8 Exchq. 30; *Oakes v. Northern Pacific R. Co.*, 20 Oreg. 393; *Brook v. Pickwick*, 4 Bing. 218. "The implied undertaking

of the proprietors of stage-coaches, railroads, and steamboats, to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, which consists of such articles of necessity or convenience as are usually carried by passengers for their personal use, comfort, and convenience; and not merchandise or other valuables, although carried in trunks of passengers, which are not designed for any such purpose." *PEYTON, J.*, in *Miss. Central R. Co. v. Kennedy*, 41 Miss. 671.

⁴ *Toledo, &c. R. Co. v. Hammond*, 38 Ind. 379; *New Orleans, &c. R. Co. v. Moore*, 40 Miss. 39.

⁵ *McCormick v. Hudson River R. Co.*, 4 E. D. S. (N. Y.) 181; *Smith v. Boston, &c. R. Co.*, 44 N. H. 325. Compare *Michigan, &c. R. Co. v. Carrow*, 73 Ill. 348.

not be entitled to place there, at the risk of the carrier, so large a sum as a person undertaking a long journey, as in all cases the question of *reasonableness* in this respect is to be determined in view of the circumstances. This rule is well illustrated by a recent case decided in the United States Supreme Court.¹ In that case a Russian lady travelling in this country carried as a part of her baggage and for her personal use a large quantity of lace, used as a part of her wearing-apparel on certain occasions, and which she valued at seventy-five thousand dollars, and which the jury found to be worth ten thousand. The trunk containing it was lost, and the court held that under the circumstances a recovery could be had therefor. "Manuscript books," the property of a student, and used in the prosecution of his studies, have been held to be ordinary baggage; also a gun and fishing-tackle;² so the instruments of an army surgeon travelling with troops;³ an opera-glass;⁴ a carpenter's tools;⁵ a pocket-pistol and a pair of duelling-pistols;⁶ linen, cut into shirt-bosoms for the use of the passenger;⁷ a watch;⁸ personal jewelry;⁹ a rifle, a revolver, two gold chains, two gold rings, and a silver pencil-case;¹⁰ a proper sum of money for travelling expenses;¹¹ but not an amount beyond that which a prudent person would deem proper for the purpose;¹² nor money belonging to another passenger, however reasonable in amount.¹³ Money, in order to constitute baggage, must be confined to such a reasonable sum as is necessary to defray the expenses of the journey; consequently, money placed in a trunk for the purpose of buying clothing at the place to which the passenger is going, has been held not to be recoverable as baggage.¹⁴ Thus, in the case last cited, the plaintiff admitted that sixty dollars of the

¹ New York Central, &c. R. R. Co. v. Torpey v. Williams, 3 Daly (N. Y.), Fraloff, 100 U. S. 24. 162.

² Hopkins v. Westcott, 6 Hill (N. Y.), 589.

³ Hannibal R. R. Co. v. Swift, 12 Wall. (U. S.) 262.

⁴ Toledo, &c. R. R. Co. v. Hammond, 33 Ind. 379.

⁵ Porter v. Hildebrand, 14 Penn. St. 129.

⁶ Woods v. Denin, 13 Ill. 746. But see Chicago, &c. R. R. Co. v. Collins, 56 Ill. 212, where it was held that only one pistol could be recovered for as baggage.

⁷ Duffy v. Thompson, 4 E. D. S. (N. Y. C. P.) 178; McCormick v. Hudson River R. R. Co., 4 E. D. S. (N. Y. C. P.) 181;

⁸ Jones v. Voorhees, 10 Ohio, 145.

⁹ Doyle v. Kyser, 6 Ind. 242; McCormick v. Hudson River R. R. Co., ante; Torpey v. Williams, 3 Daly (N. Y. C. P.), 162.

¹⁰ Braty v. Grand Trunk Ry. Co., 32 U. C. Q. B. 66.

¹¹ Merrill v. Grinnell, 30 N. Y. 594.

¹² Jordan v. Fall River R. R. Co., 5 Cush. (Mass.) 69; Dunlap v. International Steamboat Co., 98 Mass. 371.

¹³ Stewart v. International Steamboat Co., 98 Mass. 371.

¹⁴ Hickox v. Naugatuck, &c. R. R. Co., 31 Conn. 281.

money lost from his trunk, was taken with him for the purpose of buying clothing, and the court held that it was not recoverable. The amount of money which may be treated as baggage is to be measured by the object, length, and purpose of the journey, and is such a reasonable sum as a prudent person would deem necessary in view of all the circumstances, and is a question of fact to be found by the jury.¹

When an extra charge is made for baggage, even though it consists of articles not within the class of ordinary baggage, it is held, in the absence of any fraud or imposition on the part of the passenger, that the carrier is liable for its loss by fraud or negligence; and this was held to be the case where a passenger packed "specie" in his trunk, and procured it to be taken as baggage, although the company advertised that "passengers are prohibited from taking with them anything as baggage but their wearing-apparel, which will be at the risk of the owner."² Among articles of necessity, for which a carrier by water is liable as baggage, is such bedding as is carried by a steerage passenger for use on the voyage;³ but not bedding packed in a trunk, or not used on the voyage.⁴ Whether bedding belonging to a person who is moving with his family, packed in a box or trunk, is baggage or not, is a question of fact for the jury, in view of all the circumstances, and the use, quality, value, and kind of articles.⁵ The rules adopted by the courts as to what constitutes ordinary baggage are not always consistent nor uniform; and the doctrine of some of the cases, carried out to their legitimate sequence, would almost admit of a passenger taking along with him his entire household furniture, if he is a *poor man*, and needs the furniture for use at the end of his journey, and it can be packed in trunks or boxes.⁶

¹ Illinois Central R. R. Co. v. Copeland, 24 Ill. 332; Jordan v. Fall River R. R. Co., 5 Cush. (Mass.) 69. In Fairfax v. New York Central, &c. R. R. Co., 73 N. Y. 167, thirty English sovereigns in a trunk were recovered for, the jury having found that the sum was reasonable for expenses under the circumstances.

² Camden, &c. R. R. Co. v. Baldauf, 16 Penn. St. 67.

³ Hirschshon v. American Packet Co., 2 J. & S. (N. Y. Superior Ct.) 521.

⁴ Connolly v. Warren, 106 Mass. 146.

⁵ Ouimit v. Henshaw, 35 Vt. 605.

⁶ Of this class are Ouimit v. Henshaw, 35 Vt. 604; and Parmelee v. Fischer, 22 Ill. 212. In the former of these cases it was held that a feather-bed and the necessary accompaniments of bedquilts, pillows, etc., belonging to a *poor man* removing with his family, might properly be regarded as personal baggage; while in the latter case "two feather-beds and pillows, two coverlets, two bed-spreads, or blankets, . . . one oil-cloth table-cover, . . . one German-silver or britannia teapot, one looking-glass, one new double-barrelled gun, one set of common dishes, two dozen

From what has been said, and the cases given, it will be seen that the question as to what constitutes "ordinary baggage," within the legal significance of the term, depends entirely upon the circumstance whether the articles are "necessary or convenient" to the traveller under the circumstances of the case, or are such as are usually carried by travellers. As we have seen, jewelry for personal use, to a reasonable extent, is within the term; but jewelry intended for presents to a traveller's friends is not.¹ But it seems that articles purchased for his family are properly baggage, if such as are usually carried, although not necessary for his use or comfort on the journey.² Masquerade costumes furnished for use at a ball,³ and masonic regalia, engravings, valuable merchandise, etc., do not come under the head of baggage,⁴ nor indeed any articles which are not necessary or convenient for the use of the passenger on his journey; and in all cases the question as to what is reasonable, necessary, or convenient is a question of fact for the jury, in view of the character of the journey and the special circumstances of the case.⁵ The rule is, that when a traveller presents to a carrier of passengers, as his baggage, a trunk or carpet-bag, without describing its contents, he impliedly represents that it only contains such articles as are usually carried as baggage, or such as are necessary for his convenience and comfort upon his journey. The carrier is not bound to inquire for articles of extraordinary value which it may contain; but if there are such, the passenger should disclose the fact, that the carrier may exercise the increased vigilance which such extraordinary value demands.⁶

German-silver spoons, one serving-box, . . . and six towels," together with considerable clothing, worth about one hundred and fifty dollars, were found by the jury to be such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey. The verdict was upheld on appeal. These cases cannot be said to conform to the principles usually adopted in this class of cases, except they are put upon the ground that travellers of the class in question, in the section of country where the action was brought, usually carried such articles as baggage, and the carrier was bound to know of the usage, and

therefore to assent to accept and take them as baggage.

¹ *Nevins v. Bay State, &c. Co.*, 4 Bosw. (N. Y.) 225.

² *Dexter v. Syracuse, &c. R. R. Co.*, 34 N. Y. 326.

³ *Michigan, &c. R. R. Co. v. Oehm*, 56 Ill. 293.

⁴ *Nevins v. Bay State, &c. Co.*, *ante*; *Pardee v. Drew*, 25 Wend. (N. Y.) 459.

⁵ *Merrill v. Grinnell*, 30 N. Y. 594.

⁶ *Michigan, &c. R. R. Co. v. Carrow*, 73 Ill. 348. In this case the trunk contained \$30,000 in jewelry, and was checked as ordinary baggage. It was destroyed by fire. The company was held not liable for its loss.

In an English case, *COCKBURN*, C. J., states the rule as to what constitutes baggage, thus: "We hold the true rule to be that whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs,¹ either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage.² This would include not only articles of apparel, whether for use or ornament, . . . but also the gun-case or the fishing apparatus of the sportsman,³ the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. On the other hand the term 'ordinary luggage,' being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier."⁴

¹ See *Phelps v. London, &c. Ry. Co.*, 19 C. B. N. S. 321.

² The English term "luggage" is exactly synonymous with our term "baggage;" its use does not obtain in this country, unless possibly in California. See *Pfister v. Central Pacific R. Co.*, 70 Cal. 169; 27 Am. & Eng. R. Cas. 246; 59 Am. Rep. 404.

³ And also his dog. Thus, in the case of *Kansas City, &c. R. Co. v. Higdon*, 94 Ala. 286; 10 So. Rep. 282, it appeared that plaintiff was a passenger for E. in a second-class car, and had his dog with him. He delivered the dog to the baggage-master and told him to put it off at E., but refused to pay him any money for the dog. On arriving at E. the baggage-master refused to deliver up the dog except upon payment of twenty-five cents, which plaintiff refused to give. The dog was carried further on, and afterwards lost through the negligence of the baggage-master. Plaintiff afterwards, but before knowing of the loss of his dog, offered to pay the required amount. It was held that he might recover damages for the loss of his dog; the fact that a

rule of the company required a fee to be paid to the baggage-master in such cases was no defence, plaintiff not being informed of it.

⁴ The court therefore held that the articles for the loss of which this action was brought — consisting of a considerable amount of bedding — could not be classed as luggage. It was such a quantity as plainly to indicate that it was not for the use of the traveller on his journey, but for the use of his household when permanently settled. The language quoted in the text is quoted with approval in *Kansas City, &c. R. Co. v. Morrison*, 84 Kan. 507, and in *Oakes v. Northern Pac. R. Co.*, 20 Oreg. 396-397, in which latter case the court held that a man and his wife, passengers, might recover for the loss of theatrical costumes, paraphernalia, advertising matter, etc. For though, as the court distinctly held, it was not baggage, yet the carrier, having accepted it with full knowledge of what it was, must be responsible for its loss. See, for similar statements of the rule, *Mauritz v. N. Y. Central R. Co.*, 28 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286; *Wilson v. Grand Trunk R. Co.*, 56

SEC. 402. When Liability for, Ceases. — The liability of a common carrier for the baggage of a passenger continues until the baggage is ready to be delivered to the owner at his destination, and until he has had a reasonable opportunity of receiving and removing it. What constitutes such reasonable time and opportunity is a mixed question of law and fact, necessarily dependent upon the peculiar surroundings of each particular case.¹ And where, for his own convenience, a passenger left his baggage in the carrier's depot over night and it was burned, it has been held that the company was not liable therefor.² The obligation to exercise ordinary care in keeping and preserving property as to which they have been relieved from their peculiar liability as insurers, by the failure of the owner to call for his baggage within a reasonable time, is not a new and independent obligation, arising from the circumstance, accidental and unprovided for, of the property being left in the hands of the carrier. The duty is

Me. 62; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *Phelps v. London, & C. Ry. Co.*, 19 C. B. N. S. 321; *Weeks v. New York, & C. R. Co.*, 9 Hun (N. Y.), 669. As a general rule the question as to whether any particular property is baggage or not is for the jury, though in reaching their conclusions they are bound to keep within the legal definitions of the term, and cannot by an arbitrary verdict make the company liable for articles clearly not baggage. *N. Y. Central R. Co. v. Fraloff*, 100 U. S. 24; *Romar v. Maxwell*, 9 Humph. (Tenn.) 622; *Brock v. Gale*, 14 Fla. 523; *Mauritz v. N. Y. Central R. Co.*, 23 Fed. Rep. 365; 21 Am. & Eng. R. Cas. 286; *Oakes v. Northern Pac. R. Co.*, 20 Oreg. 397.

A salesman's illustrated catalogue carried for his personal use on the journey is baggage. *Staub v. Kendrick*, 121 Ind. 226; 40 Am. & Eng. R. Cas. 632. A reasonable quantity of his tools carried by a mechanic is properly classed as his baggage. What is such reasonable amount is for the jury. *Kansas City, & C. R. Co. v. Morrison*, 34 Kan. 502 (plaintiff was a watchmaker and jeweller); *Davis v. Cayuga, & C. R. Co.*, 10 How. Pr. (N. Y.) 330; *Porter v. Hildebrand*, 14 Penn. St. 129. As to pictures as part of a passenger's baggage see *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155. A feather-bed, necessary for a steerage passenger on a

steamer, and used by him on the journey, is baggage. *Hirschong v. Hamburg Am. Pocket Co.*, 2 J. & S. (34 N. Y. Super. Ct.) 521; but not when packed up and not intended for use on the voyage. *Conolly v. Warren*, 106 Mass. 146. This is the principle stated and applied in the case of *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 620. But a quantity of ladies' jewelry carried in his trunk by a man travelling alone cannot be considered a part of his baggage. *Metz v. California Southern R. Co.*, 85 Cal. 329; 44 Am. & Eng. R. Cas. 433. Nor can money intended for investment be classed as baggage. *Pfister v. Central Pac. R. Co.*, 70 Cal. 169; 59 Am. Rep. 404. See also *Carlson v. Oceanic S. Nav. Co.*, 109 N. Y. 359; 34 Am. & Eng. R. Cas. 215 (reasonable quantity of jewelry may be classed as part of a lady's baggage, — opinion evidence as to usual value of the baggage carried by a certain class of passengers properly excluded).

¹ *Louisville, & C. R. Co. v. Mahan*, 8 Bush (Ky.), 184; *Dinenny v. New York, & C. R. Co.*, 49 N. Y. 546. See *Torpey v. Williams*, 3 Daly (N. Y.), 162; *Klein v. Hamburg, & C. Packet Co.*, 3 Daly (N. Y.), 390.

² *Morris v. Third Ave. R. Co.*, 1 Daly (N. Y.), 202; *Jones v. Norwich, & C. Transp. Co.*, 50 Barb. (N. Y.) 493.

imposed by the contract of carriage, and therefore rests upon the carrier with whom the contract was made, although the place of destination is beyond its route, and upon the line of a connecting carrier.¹ Where baggage which had arrived at its point of destination was left in the custody of the agent of the railroad company for the night, and during the same night the depot and contents, including the baggage, were destroyed by fire, it was held that, in order to make the company liable for the baggage so destroyed, it was incumbent on the owner to show that the fire was the result of such negligence on the part of the employes of the company as would render liable a bailee for hire.²

The rule may be said to be, that common carriers of passengers, with their ordinary baggage, for hire, are liable for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the acts of God or a public enemy; and this liability once commenced does not necessarily terminate with the transit, but *prima facie* continues until the safe delivery of the baggage to its owner. But when the passenger refuses to receive his baggage, or neglects to call for it within a reasonable time after the transit, the responsibility of the carriers is changed to that of a bailee, or more properly that of a warehouseman, and he is thenceforth liable only for loss occasioned by his own negligence or wilful default.³

It makes no difference, so far as a common carrier's responsibility for the safety of a passenger's baggage is concerned, whether the passenger travels with his baggage, or whether it is carried without him.⁴ But a carrier is not responsible for the loss of baggage which

¹ *Burnell v. New York, &c. R. Co.*, 45 N. Y. 184.

² *Louisville, &c. R. Co. v. Mahan*, 8 Bush (Ky.), 184. After the arrival of the baggage at the destination to which it was checked, it is the duty of the company to store it, and hold it ready for delivery until the owner calls for it. But after the owner has had a reasonable time in which to call for it, the company's liability is that of a warehouseman only, and not that of a carrier. *Curtis v. Avon, &c. R. Co.*, 49 Barb. 148; *Chicago, &c. R. Co. v. Fairclough*, 52 Ill. 106; *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646; *Mattison v. New York, &c. R. Co.*, 57 N. Y. 552; *Kansas City, &c. R. Co. v. Morrisou*, 34 Kan. 502; 23 Am. & Eng.

R. Cas. 481; *Patscheider v. Great Western Ry. Co.*, 3 Exch. Div. 153; 31 Moak's Rep. 165.

³ *Roth v. Buffalo, &c. R. Co.*, 34 N. Y. 548. When baggage was destroyed with the train by a flood, and defendant introduces uncontradicted evidence that the flood was of such an extraordinary character that it could not have been anticipated, the court should direct a verdict for the defendant. Such a cause was clearly an act of God and in such a case proof of the loss creates no presumption of negligence against the company. *Long v. Pennsylvania R. Co. (Penn.)*, 23 Atl. Rep. 459; 29 W. N. Cas. 315.

⁴ *Wilson v. Chesapeake, &c. R. Co.*, 21 Gratt. (Va.) 654.

is not intrusted to his keeping, but which the passenger himself takes charge of. If the passenger prefers to retain the custody of his effects, he must assume responsibility for their loss unless he can show that the loss was the proximate consequence of the carrier's negligent breach of a plain duty.¹ Thus, where passengers left a portion of the jewelry usually worn by them in the stateroom of a steamboat, and it was stolen, it was held that the carrier was not responsible therefor.² But in some of the cases,³ it is held that the mere supervision of his baggage by a passenger, or his having the means of entering the place of its deposit, is not sufficient to discharge the carrier from liability for its loss; and that there must either exist the *animus custodiendi* on the part of the passenger to the exclusion of the carrier, or he must be guilty of such negligence as excuses the latter from his general obligation; and that the proprietor of a steamboat is responsible for baggage of a passenger which he has locked up in his stateroom, but which is stolen therefrom on the journey.⁴ But where a passenger on an emigrant vessel retains

¹ There are numerous cases in which the passenger's property has been stolen from him while it was in his own custody, and the courts have uniformly held that in such cases there was no liability on the part of the company. *Del Valle v. Steamboat Richmond*, 27 La. An. 90; *Abbott v. Bradstreet*, 55 Me. 530; *Clark v. Burns*, 118 Mass. 275; *Kinsley v. Lake Shore, &c. R. Co.*, 125 Mass. 54; 19 Alb. L. Jour. 113; *Williams v. Keokuk Packet Co. (Mo.)*, 3 Cent. L. Jour. 400; *Sewall v. Allen*, 6 Wend. (N. Y.) 335; *Weeks v. New York, &c. R. Co.*, 72 N. Y. 50; *American Steamship Co. v. Bryan*, 83 Penn. St. 446; *Talley v. Great Western Ry. Co.*, L. R. 6 C. P. 44; *Bergheim v. Great Eastern Ry. Co.*, 3 Ch. Div. 221; 30 Moak's Eng. Rep. 117; *Great Western Ry. Co. v. Bunch*, 13 App. Cas. 31; 34 Am. & Eng. R. Cas. 224. Compare *Le Conteur v. London, &c. Ry. Co.*, L. R. 1 Q. B. 54; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. s. (N. Y.) 229; *Gore v. Norwich, &c. Transp. Co.*, 2 Daly (N. Y.), 254. In the celebrated case of *Henderson v. L. & N. R. Co.*, 20 Fed. Rep. 430; affirmed, 123 U. S. 61; 31 Am. & Eng. R. Cas. 95, a lady passenger carried with her a bag containing jewelry and money which she accidentally dropped out of the window. She immediately informed the conductor,

but he refused to stop the train until the next station was reached. On arriving there she sent messengers after the bag, but it could not be found. In a suit by her against the railroad company to recover the value of the bag and its contents, it was held that she could not recover. Other cases sustaining the rule of the text are: *Weeks v. New York, &c. R. Co.*, 9 Hun (N. Y.), 669; 72 N. Y. 50; *ante*, p. 1704; *Gleason v. Goodrich Tr. Co.*, 32 Wis. 85; But to relieve the carrier it must appear affirmatively that it did not have custody of the lost effects. *Macklin v. N. J. Steamboat Co.*, 7 Abb. Pr. N. s. (N. Y.) 229; *Le Conteur v. London, &c. R. Co.*, L. R. 1 Q. B. 54. In the case of *Bonner v. Grumbach* (Tex. Civ. App.), 21 S. W. Rep. 1010, the passenger after removing his overcoat placed it on an unoccupied seat; soon afterwards the coach was overturned into the water, and when passenger recovered his coat he missed his money. It was held that his failure to notify the carrier immediately of his loss, or to make any effort to recover his money, would preclude a recovery of damages by him.

² *The R. E. Lee*, 2 Abb. (U. S.) 49.

³ *Mudgett v. Bay State Steamboat Co.*, 1 Daly (N. Y.), 151.

⁴ See also to same effect, where the boat-owner was held responsible for an

his trunk in his own possession, and it is stolen, the owners of the ship are not liable. To render them liable it must be placed under their charge.¹ Nor is a railroad company responsible for the loss by theft, or otherwise, of baggage or any property taken by a passenger into the car with him.²

But if the carrier interferes with a passenger's baggage while in a passenger-car, — as, if his servants remove it from one car to another, or attempt to do so, — and it is lost by reason of their negligence, he is responsible therefor. Thus, in a Massachusetts case,³ it appeared that the plaintiff, on leaving a sleeping-car to get his dinner, was informed by an employé of the defendant that his baggage, if left therein, would be safe; and upon his return he found the car locked and detached, and was informed that he could have a seat in another sleeping-car, and would find his baggage there, but upon going there he found only part of his baggage. No previous notice of the change had been given him, and there was no evidence that he knew that the first car was not owned by the defendant, but by another company, who, by a contract with the defendant, provided conductors and servants therefor. The court held that the jury were warranted in finding that the missing bag was lost through the negligence of the defendant, and that the defendant was liable therefor, although the first car was not owned by it. So, while a carrier is not obliged to accept anything but ordinary baggage as baggage, yet *if without extra compensation, and knowing that it is not personal baggage*, he permits it to be carried and treated as such, he is liable for its loss.⁴

overcoat hung up in his stateroom by a passenger, and which was stolen therefrom, *Gore v. Norwich, &c. Transp. Co.*, 1 Daly (N. Y.), 254; *s. p. Van Horn v. Kermit*, 4 E. D. Smith (N. Y.), 453; *Crozier v. Boston, &c. Steamboat Co.*, 43 How. (N. Y.) Pr. 466; *Duffy v. Thompson*, 4 E. D. Smith (N. Y.), 178.

¹ *Cohen v. Frost*, 2 Duer (N. Y.), 335.

² *Tower v. Utica, &c. R. Co.*, 7 Hill (N. Y.), 47 (passenger's overcoat left by him on the seat). The Texas courts have applied a somewhat different rule. In a case in that State, it appeared that a passenger on arriving at his destination, hurriedly left the car on the suggestion of the employé in charge of it that the train would soon start, and left a valise therein, which the employé knew to contain valuables.

It remained in the custody of the company's employés for some time and was then rifled.* It was held that the company was liable for the loss, although the passenger's journey had been completed. The negligence of the passenger in leaving his baggage was not sufficient to release defendant. *Bonner v. De Mendoza* (Tex.), 16 S. W. Rep. 976. Compare *Tower v. Utica, &c. R. Co.*, 7 Hill (N. Y.), 47.

³ *Kingsley v. Lake Shore R. Co.*, 125 Mass. 54; 28 Am. Rep. 200.

⁴ *Ross v. Missouri, &c. R. Co.*, 4 Mo. App. 582. In *Waldron v. Chicago, &c. R. Co.*, 1 Dakota, 351, the plaintiff, after buying a ticket for himself, son, and two daughters, pointed out to the baggage-master as his baggage three trunks and two boxes, one of which was a rough pine

In a Missouri case,¹ a passenger delivered his trunk and a piece of carpeting to the baggage-master of a passenger train, and received a check for his trunk, but was told that no check was necessary for the carpet, as it would go safely; it was held that the railroad company was liable for the loss of the carpet, although by the printed rules of the company the baggage-master was forbidden to receive as baggage any article of merchandise. In an English case,² pencil-sketches of an artist, placed in his portmanteau, were held not to form part of his ordinary luggage, so as to entitle them to be conveyed free of charge.³ And the "ordinary luggage," for which a railway company would be held responsible, does not include a client's title-deeds, which an attorney may be carrying with him to produce in court; nor can the words be held to mean bank-notes (to a considerable amount), which may be packed in a bag or portmanteau by the attorney, to be carried for the purpose of defraying the expenses of the trial.⁴ It has, however, been definitely decided that those articles only which travellers usually carry with them as part of their luggage come within the definition of ordinary or personal luggage, which a railway company is bound to carry with a passenger free of charge.⁵ It may, in

box, twenty inches square and ten inches deep, having nothing to which a check could be fastened, whereupon the baggage-master said he would place it in the baggage-car, and it would go just as safely, only that it would have to be looked after at M., or it might be taken beyond that station. On arriving at M. the pine box was missing. It appeared that one T. had bought a ticket to S., requesting the night baggage-master to check the box thereto; that T. unlocked and took from the box and presented to him a photograph of W.'s family; that T. then locked the box and put a rope around it, whereto a check to S. was attached, and at S. the box was delivered to T. There was no other evidence than that stated, that T. was the plaintiff's agent, and the plaintiff denied any such agency. It was held that the company having received the box upon the passenger train without the plaintiff's having concealed the fact that it was not personal baggage, the fact that it was not such in fact did not save them from liability therefor.

¹ *Minter v. Pacific R. Co.*, 41 Mo. 503. See post, § 406, n.

² *Munster v. Southeastern Ry. Co.*, 4 Jur. N. S. 738; 27 L. J. C. P. 308; 4 C. B. N. S. 676; *Richards v. London, &c. Ry. Co.*, 7 C. B. 839; 18 L. J. C. P. 251.

³ *Mytton v. Midland Ry. Co.*, 28 L. J. Exch. 385.

⁴ *Phelps v. London, &c. Ry. Co.*, 19 C. B. N. S. 321; 11 Jur. N. S. 552; 34 L. J. C. P. 259; 13 W. R. 782. But see, where a different rule of law was laid down, *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *Dunlap v. International, &c. Co.*, 98 Mass. 371.

⁵ *Hudson v. Midland Ry. Co.*, L. R. 4 Q. B. 366. Thus, a child's toy, called a spring-horse, seventy-eight pounds in weight, and forty-four inches in length, standing on a flat surface, is not within the regulation of a company allowing first-class passengers one hundred and twelve pounds of "personal luggage only (not being merchandise, or other articles carried for hire or profit) free of charge." *Hudson v. Midland Ry. Co.*, 10 B. & S. 504. See *Zunz v. Southeastern Ry. Co.*, L. R. 4 Q. B. 539. See also, with regard to the arrangements of a company as to the amount of luggage to be carried by passengers

many cases, be a question for the jury what a man's personal luggage consists of; for it may be allowable that a man should carry different articles with him, and that articles which, at one time and under one set of circumstances, should not be considered personal luggage might, at another time and under different circumstances, be looked at in that light. Thus, a man who was carrying in his portmanteau an article which was meant as a present to some one he was going to visit, might clearly regard that in the light of personal luggage while upon the journey to the residence of his friend, although it might not be such an article as "travellers usually carry with them as a part of their luggage."¹

In an English case,² the plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of articles of wearing apparel, and wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was to be at the company's risk. The package was left behind, and was afterwards taken to the lost-property office, where it was detained, and 6*d.* demanded for its restoration. It was held that the company was not justified in refusing to carry the package at its own risk, and was responsible for its detention.³

travelling by cheap excursion trains, *Rumsey v. Northeastern Railway Co.*, 14 C. B. N. s. 641; *Stewart v. London & North-western Railway Co.*, 10 Jur. N. s. 805; *Walsh v. The H. M. Wright*, 1 Newberry (U. S.), 494.

¹ *Hudson v. Midland Ry. Co.*, L. R. 4 Q. B. 366; *The Ionic*, 5 Blatchf. (U. S. C. C.) 538. The baggage for which a carrier of passengers is liable is not limited to such apparel or other articles as are absolutely necessary or material for the use, comfort, or convenience of the passenger on his journey, or while away from his home. It may include articles of ordinary wearing-apparel, purchased on a journey to be carried home for the use of the passenger or for that of members of his immediate family. It should not be deemed to include articles purchased for a stranger, — *Dexter v. Syracuse, &c. R. Co.*, 42 N. Y. 326, — or presents for friends outside his

immediate family. *Nevins v. Bay State, &c. Co.*, 4 Bosw. (N. Y.) 225. A passenger cannot include in his baggage the property of other persons; and in no case can the company be made liable for the loss of such property. *First Nat. Bank v. Marietta, &c. R. Co.*, 20 Ohio St. 260; *Weed v. Saratoga, &c. R. Co.*, 19 Wend. (N. Y.) 534; *Dexter v. Syracuse, &c. R. Co.*, 42 N. Y. 326; *Chicago, &c. R. Co. v. Boyce*, 73 Ill. 510; *Dunlap v. International Steamboat Co.*, 98 Mass. 371, *Becher v. Great Eastern Ry. Co.*, L. R. 5 Q. B. 241. But members of the same family, travelling together, may carry each other's effects as baggage. *Dexter v. Syracuse, &c. R. Co.*, 42 N. Y. 326; *Curtis v. Delaware, &c. R. Co.*, 74 N. Y. 116.

² *Munster v. Southeastern Ry. Co.*, 4 C. B. N. s. 676.

³ In an action against a carrier for

SEC. 403. **Baggage-checks, effect of.**—Checks given for baggage are merely evidence of its having been received by the carrier, and of its non-delivery, but do not of themselves establish the carrier's liability therefor; because, if they are obtained under the pretence that the owner of the baggage is a passenger, and has obtained tickets for that journey, or is about to do so, when such is not the fact, the carrier cannot be held chargeable as such for the baggage. The contract from which his liability for the safe carriage of the baggage arises is the contract for the carriage of the passenger himself.¹ Consequently a contract to carry a passenger to a certain place, although it involves his transportation over several lines of railroads, is also operative as a contract to carry his baggage to the same point.² And in the case last cited, where a railroad company had an arrangement with a stage company to carry passengers and baggage from a certain point on its line to another point, it was held that, having issued a ticket to such place, it was liable for the loss of the passenger's baggage by the stage company.³ But if the passenger elects

damages and expenses incurred in consequence of a delay of baggage, it is competent to show the damages sustained by reason of being compelled to buy clothes to supply the place of those delayed in their delivery by the company, also in waiting for the arrival of the goods. The difference in value of the goods when delivered and that when they should have been delivered forms no part of the damages. *International, &c. R. Co. v. Phillips*, 63 Tex. 590. But damages cannot be recovered, it is said, for expense incurred in making search for lost baggage. *Texas, &c. R. Co. v. Ferguson* (Tex. 1882), 9 Am. & Eng. R. Cas. 395. Where there is no proof as to the value of the contents of the lost trunk, or of what they consisted, the jury may give damages proportioned to the value of the articles which they, in their judgment, think the trunk did and might fairly contain. *Dill v. South Carolina R. Co.*, 7 Rich. (S. C.) 158; 62 Am. Dec. 497. Where the passenger's baggage is wrongfully carried beyond its destination, exemplary damages may be recovered if it is shown that the injury was committed wilfully or through such negligence as indicates a wanton disregard of the rights of others.

Pittsburgh, &c. R. Co. v. Lyon, 123 Penn. St. 140; 37 Am. & Eng. R. Cas. 231.

¹ *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Chicago, &c. R. Co. v. Clayton*, 78 Ill. 616; *Davis v. Michigan Southern R. Co.*, 22 Ill. 278; *Milnor v. New York, &c. R. Co.*, 53 N. Y. 363; *Dill v. South Carolina R. Co.*, 7 Rich. (S. C.) L. 158 ("it stands in the place of a bill of lading"); *Wilson v. Chesapeake, &c. R. Co.*, 21 Gratt. (Va.) 654. See also *Isaacson v. N. Y. Central R. Co.*, 94 N. Y. 278; 16 Am. & Eng. R. Cas. 188; *Denver, &c. R. Co. v. Roberts*, 6 Col. 333; 18 Am. & Eng. R. Cas. 627; *Atchison, &c. R. Co. v. Brewer*, 20 Kan. 669; *Allebeck v. Chicago, &c. R. Co.*, 39 Minn. 424; *Davis v. Cayuga, &c. R. Co.*, 10 How. Pr. (N. Y.) 330; *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 38; 16 Am. & Eng. R. Cas. 627; *Anderson v. Wabash, &c. R. Co.*, 65 Iowa, 131; 18 Am. & Eng. R. Cas. 377 (check issued to two persons jointly).

² *Wilson v. Chesapeake, &c. R. Co.*, 21 Gratt. (Va.) 654.

³ See also, as to connecting lines of railroads, *Le Sage v. Great Western R. Co.*, 1 Daly (N. Y.), 306; *Hart v. Rensselaer R. Co.*, 8 N. Y. 37; *Weed v. Saratoga, &c. R. Co.*, 19 Wend. (N. Y.) 534; *Can-*

to do so, he may proceed directly against the carrier by whom the baggage was lost, — the only disadvantage in the latter instance being that he takes the burden of showing that the carrier sued lost the baggage, while if he proceeds against the first carrier, he is only called upon to prove the loss of the baggage, without being required to show by which carrier.¹ In a Virginia case,² it was held that railway-checks given for baggage are admissible in evidence to show what the carrier's undertaking was. In other words, they are admissible to show that a contract was in fact made and issued in connection with a through ticket, — an evidence to show that the carrier undertook to carry the passenger through or otherwise, according as the check is given through, or only for its own line. But the mere circumstance that a carrier gives a through check is not sufficient to establish his liability beyond his own line, unless it is also shown that he issued a through ticket. Thus, in a New York case,³ the defendant railroad issued to the plaintiff a check for baggage to the terminus of his journey, which covered its own line and a steamboat line which ran in connection therewith; but it did not issue a ticket to the passenger beyond its own line, and it was held that it could not be held liable for the loss of the baggage by the steamboat company. But if a passenger takes his baggage in the car with him over the first line, but procures it to be checked and carried in the baggage-car over the second, the first line cannot be held chargeable for the loss of the baggage, because it never had it in its custody;⁴ though if it received the baggage in the outset, the fact that it was rechecked at another point on the route and by another carrier does not change its liability.⁵ The possession of a railway bag-

dec v. Pennsylvania R. Co., 21 Wis. 582; *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; *Torpey v. Williams*, 3 Daly (N. Y.), 162; *Burnell v. New York Central R. Co.*, 45 N. Y. 484; *Cary v. Cleveland, &c. R. Co.*, 29 Barb. (N. Y.) 85.

¹ *Barter v. Wheeler*, 49 N. H. 9; *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88; *Coates v. U. S. Express Co.*, 45 Mo. 238; *Toledo, &c. R. Co. v. Merriam*, 52 Ill. 88; *Cincinnati, &c. R. Co. v. Pontius*, 19 Ohio St. 222; *McCormick v. Hudson River R. Co.*, 4 E. D. S. (N. Y.) 181; *Kessler v. N. Y. Central R. Co.*, 61 N. Y. 538.

² *Wilson v. Chesapeake R. Co.*, 21 Gratt. (Va.) 654. See *ante*, § 359.

³ *Green v. New York, &c. R. Co.*, 12 Abb. (N. Y.) Pr. N. s. 473.

⁴ *Straiton v. New York, &c. R. Co.*, 2 E. D. Smith (N. Y.), 184.

⁵ *Candee v. Pennsylvania R. Co.*, 21 Wis. 582. See also *Mobile, &c. R. Co. v. Hopkins*, 41 Ala. 486. Holding that the first carrier, issuing a through ticket and checking the baggage through, is liable for its loss, see *Chicago, &c. R. Co. v. Fahey*, 52 Ill. 81; *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; *Glasco v. N. Y. Central R. Co.*, 36 Barb. (N. Y.) 557; *Check v. Little Miami R. Co.*, 2 Dis. (Ohio) 237; *Kessler v. N. Y. Central R. Co.*, 7 Lans. (N. Y.) 62; *Najac v. Boston, &c. R. Co.*, 7 Allen (Mass.), 320. Or that

gage-check, accompanied by evidence of the baggage-master that, when required by passengers, he put checks on their baggage and gave duplicates to the passenger, is sufficient evidence that a person was a passenger on the cars, and that he had the baggage checked.¹ Thus, in a South Carolina case,² a check in the possession of a passenger was held to be evidence that the passenger's baggage was delivered to the company, and, as a trunk is the usual receptacle for baggage, that a trunk with its contents was delivered to it. In a Kansas case,³ a passenger from New York to Junction City, Kan., delivered his checks for his baggage to the baggage-master of the defendant with the understanding that the defendant should forward it to Junction City; and this was held evidence to go to the jury to establish the fact that the defendant received the baggage. It is only *prima facie* evidence that the carrier received the passenger's baggage.⁴

SEC. 404. Rule as to Liability before Baggage is checked.—In order to render a carrier liable for the loss of baggage, it is sufficient to show a delivery of the baggage to him; and from the time of such delivery, although some time in advance of the time when it will start upon its transit, the carrier is liable for it as a common carrier, and not as a warehouseman; and if it is lost *before* the time for it to start upon its transit, the carrier is liable. Thus, in a Connecticut case,⁵ the plaintiff took his trunk to the defendant's depot at Waterbury, at eleven o'clock A. M. and asked to have it checked to Bridgeport, on the train which started at three P. M. He was told that it was not their custom to check baggage until fifteen minutes before the train started, whereupon he left his trunk with the agent in the baggage-room, and at the customary time it was checked and put on the cars for Bridgeport. It was rifled after its delivery to the defendant, but whether before or after it left the station did not appear. The defendant asked the court to charge the jury that if the trunk was rifled after it was taken to the depot, and before it

the passenger may hold the line actually losing the baggage therefor, — *Burnell v. N. Y. Central R. Co.*, 45 N. Y. 184; *Check v. Little Miami R. Co.*, 2 Dis. (Ohio) 237; *Kessler v. N. Y. Central R. Co.*, 61 N. Y. 538; *Burtis v. Buffalo, &c. R. Co.*, 24 N. Y. 269; *Root v. Great Western R. Co.*, 45 N. Y. 525.

¹ *Davis v. Cayuga, &c. R. Co.*, 10 How. (N. Y.) Pr. 330.

² *Dill v. South Carolina R. Co.*, 7 Rich. (S. C.) 158.

³ *Kansas Pacific R. Co. v. Montelle*, 10 Kan. 119; *Davis v. Michigan, &c. R. Co.*, 22 Ill. 278; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

⁴ *Chicago, &c. R. Co. v. Clayton*, 78 Ill. 616.

⁵ *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

was checked, there could be no recovery. The court refused so to charge, and upon appeal its ruling was sustained.¹

SEC. 405. Passenger must call for Baggage within a Reasonable Time. — Upon reaching its destination, the baggage must be called for within a reasonable time, or the liability of the company is changed from that of a carrier to that of a mere warehouseman. And what is a reasonable time depends upon the circumstances. It may be shown that the depot was at a distance from a hotel or village, and that there were no conveyances obtainable to take the baggage away, or that passenger was sick and lame and unable to take charge of the baggage personally, to excuse the passenger from calling for his baggage upon the arrival of the train; and if it is shown that the defendant's agents agreed to let the baggage remain until called for, the carrier remains liable for it, *as carrier*, if it is called for within a reasonable time.² But in the latter case it was held that if baggage is left with the carrier for an unreasonable time without being called for, and no arrangement is made that the carrier shall retain it for him, and it is

¹ *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69. In the case of *Rogers v. Long Island R. Co.*, 56 N. Y. 620, it appeared that the plaintiff sent his trunk to the defendant's depot at P. by an expressman, at about the hour of noon. It was marked "Israel P. Rogers, Riverhead, L. I." The expressman found inside the depot-gate, where he carried the trunk, two or three men unloading freight, of whom he inquired who took charge of the baggage. They told him, the man in the office. He saw the man in the office, and told him he had a trunk outside, and the man said "All right," and immediately sent two men to take care of it. The trunk was left by the expressman where the baggage was kept, and inside the defendant's enclosure and near their baggage-crate, which at that time was locked. The man in the office had been the defendant's ticket-agent for some years. The plaintiff went to the station at three o'clock, and bought a ticket to Riverhead, and called for his trunk, and it could not be found. The court held that these facts showed a delivery to the defendants, and were sufficient to charge them with the loss of the trunk. But, as a general rule, in order to recover, the passenger must first show that baggage came into possession of the defendant com-

pany. The fact that he holds a baggage check is *prima facie* evidence of the company's possession, but it is *prima facie* only and may be rebutted. *Dill v. Railroad Co.*, 7 Rich. (S. C.) L. 160; *Chicago, &c. R. Co. v. Clayton*, 78 Ill. 616; *Davis v. Mich. Southern R. Co.*, 22 Ill. 278.

² *Curtis v. Avon, &c. R. Co.*, 49 Barb. (N. Y.) 148. Of course the passenger is entitled to a reasonable time in which to call for his baggage after its arrival at his destination. As has been just stated, the question of what is such reasonable time is one fact, in view of the customs of the country, the manner and facilities for transporting baggage from the station, and all the surrounding circumstances; and what would be a reasonable time in one case might not be so in another. *Mote v. Chicago, &c. R. Co.*, 27 Iowa, 22; *Louisville, &c. R. Co. v. Mahan*, 8 Bush (Ky.), 184. See same rule stated as to what is a reasonable time. *Roth v. Buffalo, &c. R. Co.*, 34 N. Y. 548; *Jones v. Norwich, &c. Transp. Co.*, 50 Barb. (N. Y.) 193; *Jacobus v. Tutt*, 38 Fed. Rep. 412; *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646. The period of reasonable time is not extended by reason of the passenger's illness. *Chicago, &c. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268.

lost without the fault of the carrier, he is not liable therefor.¹ A carrier of passengers is bound to deliver baggage to a passenger within a reasonable time after its arrival.² And if the baggage is not left at the station for which it is checked, but is carried to another and there stored, and it is lost while there, he does not cease to be carrier and become a mere warehouseman as to the baggage, as would have been the case if it had been stored at the place to which it should have been carried.³ In a New York case,⁴ the plaintiff's wife was a passenger upon the defendant road from N. to M. Immediately upon the arrival of the train at M. the depot-master placed the trunk in the baggage-room and went away. She waited fifteen minutes to get the trunk, but could find no one to deliver it. About three hours afterwards the plaintiff's son went to the depot for the trunk, but the depot-master was still absent. The son went in pursuit of him and returned with him, delivered the check, and the trunk was drawn out to the door; but meanwhile the conveyance which was employed to take the trunk had left and no other could be obtained, so it was left in charge of the baggage-master for the night. During the night it was stolen from the depot. It was held that the defendant's liability therefor as common carrier had not terminated. When baggage is lost, it is presumed to have been lost by the fraud or negligence of the carrier.⁵

SEC. 406. Right to limit Amount of Baggage and Liability therefor. — A carrier is only bound to carry for a passenger a reasonable amount of baggage, and may restrict the amount to be carried for a single passenger, or make proper regulations relative thereto;⁶ and if

¹ See *Minor v. Chicago, &c. R. Co.*, 19 Wis. 40.

² *Cary v. Cleveland, &c. R. Co.*, 29 Barb. (N. Y.) 35.

³ *Toledo, &c. R. Co. v. Hammond*, 33 Ind. 379.

⁴ *Dinunny v. New York, &c. R. Co.*, 49 N. Y. 546.

⁵ *Garvey v. Camden, &c. R. Co.*, 4 Abb. (N. Y.) Pr. 171; *Camden, &c. R. Co. v. Baldauf*, 16 Penn. St. 67.

⁶ *Norfolk, &c. R. Co. v. Irvine*, 85 Va. 217; 37 Am. & Eng. R. Cas. 227; *Collins v. Boston, &c. R. Co.*, 10 Cush. (Mass.) 506; *Blumenthal v. Maine Central R. Co.*, 79 Me. 350; 34 Am. & Eng. R. Cas. 247; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; 41 Am. Dec. 767; *Phelps v. London, &c.*

Ry. Co., 19 C. B. N. s. 321; 115 E. C. L. 321. Thus, the company may refuse to carry merchandise as personal baggage. *Post*, § 408; *Collins v. Boston, &c. R. Co.*, 10 Cush. (Mass.) 606; *The Ionic*, 6 Blatchf. (U. S.) 538; *Dibble v. Brown*, 12 Ga. 83; *Bell v. Drew*, 4 E. D. S. (N. Y.) 59; *Smith v. Conn. River R. Co.*, 44 N. H. 325; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Doyle v. Kyser*, 6 Ind. 242. Or it may refuse to carry anything as baggage except what is necessary or useful for the passenger's personal comfort and convenience. *Merrill v. Grinnell*, 30 N. Y. 594; *Stimson v. Conn. River, &c. R. Co.*, 98 Mass. 83; *Smith v. Boston, &c. R. Co.*, 44 N. H. 325; *Merrihew v. Milwaukee, &c. R. Co.* (Wis.), 5 Am. L. Reg. 364. A regulation is not

by means of fraud or misrepresentation he is induced to receive as baggage more than the amount limited, he is liable for the excess only as a gratuitous bailee, or at most as a bailee for hire.¹ If, however, he accepts an extra quantity without objection or extra charge, he is equally liable therefor as though it was within the specified amount.² If he had any reasonable ground for refusing to carry persons who apply to him, or their property, he is bound to make objection at the time the application is made. If he fails to object then, and receives them or their property for transportation, his right to object is waived, and his liability is the same as if no ground for refusal had existed.³

reasonable which provides that the company will not be responsible for baggage unless fully addressed with the name and destination of the owner, and it will not operate to limit or affect the company's common-law liability for the baggage lost. *Cutler v. North London Ry. Co.*, 16 Q. B. Div. 64; 31 Am. & Eng. R. Cas. 105.

¹ *Cincinnati, &c. R. Co. v. Marcus*, 38 Ill. 219; *Michigan Southern R. Co. v. Oehm*, 56 Ill. 298; *Chicago, &c. R. Co. v. Shea*, 66 Ill. 471; *Del Valle v. Steamboat Richmond*, 27 La. An. 90; *Smith v. Boston, &c. R. Co.*, 44 N. H. 325 (held liable as a gratuitous bailee); *Stimson v. Connecticut River R. Co.*, 98 Mass. 83 (same). The carrier is not bound to make inquiry as to the contents of a passenger's trunk, but has a right to rely upon the implied representation that it contains nothing more than actual baggage. *Michigan Central R. Co. v. Carrow*, 73 Ill. 348; *Merchants, &c. Transp. Co. v. Bolles*, 80 Ill. 473. In *Norfolk, &c. R. Co. v. Irvine*, 84 Va. 553, it is held that the company may properly require a pedler to make affidavit as to the contents of his trunk, and if he refuses to do so may decline to carry it. See also *Norfolk, &c. R. Co. v. Irvine*, 85 Va. 217; 37 Am. & Eng. R. Cas. 227.

² *Glasco v. New York Central R. Co.*, 36 Barb. (N. Y.) 557; *Central Trust Co. v. Wabash, &c. R. Co.*, 32 Fed. Rep. 566; 38 Fed. Rep. 63; 39 Am. & Eng. R. Cas. 592; *Chicago, &c. R. Co. v. Conklin*, 32 Kan. 55; 16 Am. & Eng. R. Cas. 116. In the case of *Com. v. Connecticut River R. Co.*, 15 Gray (Mass.), 447, the company was held liable to a penalty for refusal to carry, even though the agent who received

the baggage for transportation had no authority to do so. In a similar case in Missouri, the court held that the company was liable for the loss of baggage, although its baggage-master had been expressly instructed not to receive such baggage. *Minter v. Pacific R. Co.*, 41 Mo. 503. But in the case of *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, a somewhat different rule is followed. It was there held that evidence that a passenger delivered to the baggage-master a package of merchandise and received a check for it on showing his ticket, that the baggage-master knew it was merchandise, and that other passengers had similar packages, will not warrant a finding that the company agreed to transport the merchandise, or became liable for it as a common carrier, in the absence of evidence of an agreement that it should be carried as freight, or that the baggage-master had authority to bind the company to carry merchandise as personal baggage.

It is within the apparent authority of a baggage-master so to check baggage, and where he receives it and agrees to check it through by a particular route, the company is bound, although in fact he had no authority to check it by that route; at least it is a question of fact for a jury. But a baggage-master, in the absence of special authority, cannot bind his company by a contract to carry baggage beyond the terminus of its road, or fixing a special or unusual mode of delivery, as at a place other than the depot of the company. *Isaacson v. N. Y. Central R. Co.*, 94 N. Y. 278; 16 Am. & Eng. R. Cas. 188.

³ *Hannibal, &c. R. Co. v. Swift*, 12 Wall. (U. S.) 262.

But the limitation to be of any effect must be by special contract, or by a regulation brought to the passenger's notice and assented to by him. The company cannot defeat its liability as a common carrier for the loss of a passenger's baggage by a simple notice that all baggage is at the risk of the owner,¹ printed either upon the ticket or the check,² as there is no presumption that a passenger read either before entering upon his journey.³ Nor can the company place itself in the position of a private carrier as to liability for such baggage, unless notice that it will only be liable as such therefor is brought home to the knowledge of the passenger before he enters upon his journey, and has an opportunity to recede from his position of a passenger by the carrier's line, if he so elects.⁴ "Notice in the usual form," say the court in a New York case,⁵ "All baggage at the risk of the owners," though brought home to the knowledge of a passenger, will not in such cases excuse the company. Common carriers cannot by such notice excuse themselves from the implied agreement that the vessel, coach, or other vehicle used for the transportation of goods or baggage, is sufficient for the business in which it is employed." The passenger's acceptance of a receipt for his baggage, in which is printed the contract limiting carrier's liability, does not always establish the limitation; the question whether his acceptance was made with a knowledge of the special contract and of passenger's assent thereto is one of fact, the referee's determination of which upon the evidence is conclusive.⁶ But a passenger's applying for a pass, and his making use of it after his attention had been called to its terms, constitutes an assent thereto.⁷ And an assent may be implied from the acceptance and constant use of a commutation-ticket.⁸ His signing a ticket containing printed limitations of the carrier's liability, constitutes an assent thereto, although he did not

¹ Camden, &c. R. Co. v. Belknap, 21 Wend. (N. Y.) 354; Mauritz v. New York, &c. R. Co., 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286; Baltimore, &c. R. Co. v. Campbell, 26 Ohio St. 647; 3 Am. & Eng. R. Cas. 246.

² Rawson v. Pennsylvania R. Co., 48 N. Y. 212.

³ Malone v. Boston, &c. R. Co., 12 Gray (Mass.), 388; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97.

⁴ Logan v. Pontchartrain R. Co., 11 Rob. (La.) 24.

⁵ Camden, &c. R. Co. v. Burke, 13 Wend. (N. Y.) 611; 28 Am. Dec. 488.

⁶ Grossman v. Dodd, 63 Hun (N. Y.), 324. Compare post, § 425, where a different view is stated as being generally upheld in ordinary contracts for the carriage of goods.

⁷ Perkins v. New York Cent. R. Co., 24 N. Y. 196.

⁸ Bland v. So. Pac. R. Co., 55 Cal. 570; 3 Am. & Eng. R. Cas. 285; 36 Am. Rep. 50; Hoffbauer v. Delhi, &c. R. Co., 52 Iowa, 342; 35 Am. Rep. 278; Cressor v. Philadelphia, &c. R. Co., 11 Phila. (Penn.) 597; 32 Leg. Int. 363; Louisville, &c. R. Co. v. Harris, 9 Lea. (Tenn.), 80; 42 Am. Rep. 668.

read it.¹ But other cases maintain that if the passenger was unable to read,² or could not understand English, there is no assent on his part, and he cannot be bound by the limitation.³ The better rule unquestionably is that in such cases the passenger is bound by his signature, unless he can show affirmatively that artifice was used to conceal from him the nature and effect of the contract. It is universally held that persons signing their name to a message written on an ordinary telegraph-blank are bound by the printed conditions thereon, which are not unreasonable whether they knew of them or not, and the same reasons apply in the cases under consideration.⁴

As to a carrier's right to limit his liability for the loss of baggage, the rule is that he may, by special contract or by a regulation brought to the passenger's notice, restrict his common-law liability as insurer,⁵ but he cannot stipulate for an exemption from liability for the consequences of his own negligence or that of his servants.⁶

¹ *Bate v. Canadian Pac. R. Co.*, 15 Ont. App. 388; 37 Am. & Eng. R. Cas. 208; *Bethea v. Northeastern R. Co.*, 26 S. C. 91. See also *Steers v. Liverpool, &c. Co.*, 57 N. Y. 1.

² *Mauritz v. New York, &c. R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286.

³ *Camden, &c. R. Co. v. Baldauf*, 16 Penn. St. 67.

⁴ *W. Un. Tel. Co. v. Carew*, 15 Mich. 525; *Hill v. W. Un. Tel. Co.*, 85 Ga. 425; 30 Am. & Eng. Corp. Cas. 590; *Grinnell v. W. Un. Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Thompson on Electricity*, §§ 207 *et seq.*; Am. & Eng. Ency. Law, Article on "*Telegraphs*." The validity of a stipulation releasing the carrier from liability for loss of baggage through negligence was upheld, and such a contract enforced against a passenger, although it was printed on the back of a ticket containing nearly two quarto pages of printed matter, and the passenger neither signed nor read it. *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 27 N. E. Rep. 665.

⁵ *Perkins v. New York, &c. R. Co.*, 24 N. Y. 196; *Louisville, &c. R. Co. v. Harris*, 9 Lea (Tenn.), 80; 42 Am. Rep. 668; *Bland v. Southern Pac. R. Co.*, 55 Cal. 570; 36 Am. Rep. 50; 3 Am. & Eng. R. Cas. 285; *Bate v. Canadian Pac. R. Co.*, 15 Ont. App. 388; 37 Am. & Eng. R. Cas. 208. Under the Iowa code, §§ 1308, 2184, the

limitation of a company's liability to \$100 is invalid, and the courts hold that where the contract is made in another State, the law of such State will be presumed, in the absence of evidence, to be the same as that of Iowa. *Davis v. Chicago, &c. R. Co.*, 83 Iowa, 744; 49 N. W. Rep. 77.

⁶ *Mobile, &c. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Camden, &c. R. Co. v. Burke*, 13 Wend. (N. Y.) 611; 28 Am. Dec. 488; *Indianapolis, &c. R. Co. v. Cox*, 29 Ind. 360; *Cincinnati, &c. R. Co. v. Pontius*, 19 Ohio St. 221. The rule in this connection is the same as that governing ordinary carriers of goods, it having been decided in the early case of *Camden, &c. R. Co. v. Burke* (13 Wend. 611), that the liability of a company for baggage is that of a common carrier of goods. See the rule as to such carriers, *post*, § 425. See also, as sustaining the principle of the text, *Boehl v. Chicago, &c. R. Co.*, 44 Minn. 191; *Durgin v. American Express Co.* (N. H.), 20 Atl. Rep. 328; *Taylor, &c. R. Co. v. Montgomery (Tex.)*, 16 S. W. Rep. 178; *Monroe v. The Iowa*, 50 Fed. Rep. 561; *Johnson v. Alabama, &c. R. Co.*, 69 Miss. 191; 11 So. Rep. 104. In the case of *Louisville, &c. R. Co. v. Nicholai* (Ind. App.), 30 N. E. Rep. 424, the ticket contained the usual stipulation that "none of the companies represented in this ticket will assume any liability on baggage, except for wearing

The policy of the law is opposed to such agreements, and they are considered void, not only for this reason, but also because they were induced by a *quasi* duress; a passenger about to take passage is, as a rule, practically at the carrier's mercy, and has no option but to consent to the stipulations proposed.

SEC. 407. When Baggage is received by Carrier through Mistake. — If a carrier of passengers, through the mistake of a connecting carrier, receives from such carrier baggage which should be transported over another line, he is liable for its loss, although the person to whom such baggage belonged had no ticket, and was not a passenger over such line. Thus, in another New York case,¹ the plaintiff took passage at Palmyra, on the defendant's road, for New York, and purchased a ticket and checked his trunk to the latter place. On his arrival in New York, the plaintiff, without calling for his baggage, went to Brooklyn, and the second day after his arrival presented his check and demanded his trunk, but it could not be found. An action was brought to recover the value of the trunk and contents. The referee found that the trunk was lost through the negligence of the defendants and their servants, and that the plaintiff was entitled to recover, upon which a judgment was entered, which was reversed by the General Term, in the first district, and a new trial ordered, from which the plaintiff appealed. The Supreme Court placed its decision upon the ground that the defendants' liability ceased with the transportation of the trunk by the Hudson River Railroad Company to New York, and its readiness to deliver it within a reasonable time after arrival, and that whatever responsibility was incurred afterwards in keeping or storing it, was incurred by the latter company, for which the defendants were not liable. The Court of Appeals held that the defendants were liable, and repudiated the ground taken by the Supreme Court.²

SEC. 408. Merchandise, etc. — From what has been said, it will be seen that a railway company is not liable for the loss of merchan-

apparel, and then only for a sum not exceeding \$100." On the arrival of the trunk at its destination, plaintiff discovered that a valuable seal-skin cloak and other articles of clothing, altogether worth \$330, had been abstracted from it. In an action to recover for the loss it was held that as the contract of exemption did not relate to loss or damage from a particular cause, but to the amount of the loss only, and defendant

did not attempt to account for the failure to deliver the property, the jury were entitled to infer negligence on the part of defendant, and that it was therefore liable for the full amount of the loss.

¹ *Burnell v. New York Central R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61.

² *Cary v. Cleveland, &c. R. Co.*, 29 Barb. (N. Y.) 35; *Norway Plain Co. v. Boston, &c. R. Co.*, 1 Gray (Mass.), 271.

dise, or other articles not included under the term "ordinary baggage," which have been delivered to it as baggage without disclosing their character.¹ It would certainly be very unjust to hold a carrier responsible for the loss of valuable articles of merchandise which are delivered to him as, and under the guise of, ordinary luggage without giving him notice of the value, that he may exercise that degree of extra vigilance which he is likely to exercise when he knows that the value is large, and consequently that the luggage is more likely to be stolen. There can be no reason why the passenger should not take the risk, especially when he is aware, before he hands over his baggage to the carrier, that the latter will not accept it as baggage if he is informed of the contents, without extra compensation. Where it has been clearly understood that passengers are only to carry their ordinary luggage with them, and where the rates of conveyance have been calculated upon the understanding of casualties to such kinds of luggage only, it would be most unfair to allow persons to carry merchandise or money to a large amount, and in case of loss to hold the carrier liable. The implied offer and acceptance in the case of a passenger's luggage is, on the one hand, that the luggage shall be personal luggage; and, on the other hand, that the carrier will carry and insure all such personal luggage. Upon these grounds, it would be most unfair to regard a common carrier as liable in the case of the loss of merchandise which a passenger is carrying as if it was personal luggage. If, however, a passenger packs merchandise in such a way that the servants of a railway company or common carrier can see that it is merchandise, and if these servants make no objection to carrying it, or if they do not demand an extra charge, or a special bargain, with regard to it, the company will be responsible in case it is lost or damaged.² In such a case the rail-

¹ *Michigan Central R. Co. v. Carrow*, 73 Ill. 348; *Blumenthal v. Maine Central R. Co.* 79 Me. 550; 34 Am. & Eng. R. Cas. 247; *Cahill v. London, &c. Co.*, 10 C. B. N. s. 154; *affirmed*, 13 C. B. N. s. 818; *Belfast, &c. Ry. Co. v. Keys*, 9 H. L. Cas. 556; *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; *Mississippi Central R. Co. v. Kennedy*, 41 Miss. 671; *Cincinnati, &c. R. Co. v. Marcus*, 38 Ill. 219. The term "baggage," for which passenger carriers are liable, if lost, does not include articles of merchandise not intended for personal use. *Collins v. Boston R. Co.*, 10 Cush. (Mass.)

606; *The Ionic*, 6 Blatchf. (U. S.) 538; *Dibble v. Brown*, 12 Ga. 83; *Bell v. Drew*, 4 E. D. S. (N. Y.) 59; *Stinson v. Connecticut, &c. R. Co.*, 44 N. H. 325; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; 41 Am. Dec. 767; *Doyle v. Kyser*, 6 Ind. 242; *Richards v. London, &c. Ry. Co.*, 7 C. B. 839.

² *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; *Perley v. N. Y. Central R. Co.*, 65 N. Y. 375 (charge made for overweight); *Waldron v. Chicago, &c. R. Co.*, 1 Dak. 351; *Ross v. Missouri, &c. R. Co.*, 4 Mo. App. 582. In the case of *Millard v. Missouri, &c. R. Co.*, 86 N. Y. 441; 20

way company has, by its silence, modified its own permanent offer and the contract is not the same as that which exists under ordinary circumstances; and, as the contract is not the same, the liability is different. It may be said that, if the carrier, through its servants or agents charged with the duty of receiving baggage, accepts as baggage articles of merchandise, or other property not personal baggage within the legal meaning of the term, *knowing the nature of the property*, they become liable therefor as baggage;¹ and according to the case first cited in the preceding note, this is the rule, even though the passenger fraudulently procured them to accept it as such. But it seems to be the better rule that in order to render a railway company or common carriers liable in such a case, it is necessary to charge them or their servants *with actual knowledge that the thing carried was merchandise, and not personal luggage*. It is not enough to show that there was sufficient apparent upon the article carried to have directed their attention to it, and to have caused them to make inquiries. In an English case,² it appeared that the plaintiff had taken to a station a box labelled "glass," and had given it to a porter, who had placed it in the luggage-van; in the course of the journey it was lost, and the plaintiff brought the action to recover its value. The box contained merchandise, and not passenger's luggage;

Hun (N. Y.), 191, it appeared that the plaintiff purchased a ticket over the defendant's road, which entitled him to carry a certain amount of baggage. He had a packing box, or trunk, containing merchandise. Upon applying for a check, he told the defendant's agent this fact, who thereupon refused to check the trunk unless extra compensation was paid for its transportation. The plaintiff paid the sum charged. The trunk was destroyed by fire. In an action brought to recover for the loss of baggage, the court ruled that the plaintiff could not recover for the merchandise as it was not baggage, and a recovery was had for the baggage only. In an action brought to recover for the merchandise, it was held, that the former action was not a bar, as the two actions were not for parts of one entire indivisible demand, but were based upon separate contracts.

¹ Ross v. Missouri, &c. R. Co., 4 Mo. App. 582; Oakes v. Northern Pacific R. Co., 20 Oreg. 393 (company held liable for loss of theatrical property, costumes, etc., it having been accepted as baggage

by the company's servants); Macrow v. Great Western R. Co., L. R. 6 Q. B. 620; Great Northern Ry. Co. v. Shepherd, 8 Exch. 30; Waldron v. Chicago, &c. R. Co., 1 Dak. 351; 46 N. W. Rep. 356. But, *contra*, see Blumantle v. Fitchburg R. Co., 127 Mass. 322. If a carrier accepts and transports as baggage for a passenger, articles of merchandise, knowing them to be such, he assumes thereto the relation of a common carrier. Hannibal, &c. R. Co. v. Swift, 12 Wall. (U. S.) 262; Butler v. Hudson River R. Co., 3 E. D. Smith (N. Y.), 571. A trunk or valise containing samples of merchandise belonging to a merchant, but taken along by an agent to be used in procuring orders for similar goods, is not baggage for which a carrier is liable, even though he has checked it as baggage, but in ignorance of its contents. Stimson v. Connecticut River R. Co., 98 Mass. 83; Gurney v. Grand Trunk Ry. Co., 14 N. Y. Supp. 321; Texas, &c. R. Co. v. Capps (Tex. 1884), 16 Am. & Eng. R. Cas. 118.

² Cahill v. London, &c. Ry. Co., 10 C. B. N. s. 154; 30 L. J. C. P. 287.

but it was contended, on behalf of the plaintiff, that the fact of the box being labelled "glass" was enough to indicate to the defendants that it contained merchandise, and that, as they accepted it without further charge, they were responsible. Judgment was given for the defendants, and ERLE, C. J., said: "It seems to me that it would be introducing a rule most pernicious to public convenience that a railway company, to avoid being fixed with liability, which, according to their regulations, they do not intend to take, should be bound to make inquiries where a package is brought which appears likely to contain merchandise, and if they do not make those inquiries, that they should be taken to know the contents of such package." The whole court held that the company had not knowledge that this was merchandise by the fact of the box being so labelled, and this decision was upheld by the Exchequer Chamber.¹

¹ Cahill v. London, &c. Ry. Co., 18 C. B. N. S. 818; 31 L. J. C. P. 271.

CHAPTER XXVI.

INJURIES RESULTING IN DEATH.

SEC. 409. No Remedy at Common Law.

410. Remedy given by Statute.

411. Actions not necessarily Local.

412. Construction of these Statutes.

SEC. 413. Rules Applicable to this Class of Actions.

414. Damages Recoverable.

415. Limitation of Actions.

416. Parties to the Action.

SEC. 409. **No Remedy at Common Law.** — At the common law, where an injury received through the negligence of another results in death, no remedy can be had therefor;¹ and under the maxim *actio personalis moritur cum persona*, even though the person injured had commenced an action therefor, but died during its pendency, the action abates, and cannot be revived by his personal representatives.² But generally, the remedy is saved by statute in the several States, either in favor of the estate or of the widow or children. In such cases, where death does not instantly ensue, the remedy is saved; but where the injury and death are simultaneous, the remedy never attaches, and consequently cannot survive. But if the deceased survived the injury for any, even the shortest, space of time, so that a right of action attached to him, it survives under these statutes; and this is the case, even though the deceased was deprived of all consciousness and intelligence. But in such a case there can be no recovery of substantial damages in the absence of any evidence of any considerable expense, loss, or damage incurred between the time of the injury and the death.³ The fact that death and the injury

¹ *Higgins v. Butcher*, Yelv. 89; *Baker v. Batton*, 1 Camp. 493; *Eden v. Lexington*, &c. R. Co., 14 B. Mon. (Ky.) 204; *Wyatt v. Williams*, 43 N. H. 102; *Campbell v. Rogers*, 2 Handy (Cinn.), 110; *Lucas v. N. Y. Central R. Co.*, 21 Barb. (N. Y.) 245; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *State v. Grand Trunk R. Co.*, 58 Me. 176; *State v. Manchester*, &c. R. Co., 52 N. H. 528; *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475; *Conn. Mut. Life Ins. Co. v. N. Y. & New Haven*

R. Co., 25 Conn. 275; *Worsley v. Cincinnati*, &c. R. Co., 1 Handy (Cinn.), 481; *Hyatt v. Adams*, 16 Mich. 180; *Kearney v. Boston*, &c. R. Co., 9 Cush. (Mass.) 108; *Wyatt v. Williams*, 43 N. H. 102; *Long v. Morrison*, 14 Ind. 495.

² *Cregin v. Brooklyn*, &c. R. Co., 75 N. Y. 192; *Whitford v. Panama R. Co.*, 23 N. Y. 465.

³ *Tully v. Fitchburg R. Co.*, 134 Mass. 499.

were not simultaneous, must be proved by the plaintiff, and it seems that survival must be shown by something more than a mere spasmodic twitching of the muscles of the body, which is consistent with the extinction of life.¹

SEC. 410. Remedy given by Statute.—In all of the States, a remedy is now given by statute for a fatal injury resulting from the negligence of railway companies. In most of the States, the remedy is to be prosecuted by action in the name of the executor or administrator of the estate of the deceased, for the benefit of those relatives of the deceased specified in the statute; but in some of the States the remedy is by a prosecution in the name of the State, and the recovery is in the nature of a fine, which is distributed to such relatives of the deceased as the statute designates.² As the remedy exists, and is created only by statute, it follows that it can only be pursued in the mode and under the conditions specified therein,³ and for the benefit of the persons named therein. In England and Pennsylvania, the action is given for the benefit of the immediate family of the deceased, to the exclusion of the next of kin, and includes only husband and wife, parents and children.⁴ But in most of the States the remedy is for the benefit of the husband or widow, and next of kin; and in such cases, if there is neither husband nor widow, the remedy exists in favor of the next of kin,⁵ and depends, not upon their right to the services of the deceased, but upon the circumstance that they come within the class designated in the statute.⁶

¹ *Haring v. N. Y. & Erie R. Co.*, 13 Barb. (N. Y.) 9.

² This is, or was, the case in Maine, Massachusetts, and New Hampshire, and in Maryland the action is prosecuted in the name of the State, but is civil in form.

³ In Georgia, under the statute, where the tort complained of is *prima facie* a felony, the father, in an action for causing the death of the child, must allege that he has prosecuted the agent of the company, on the criminal side of the court, or set forth a sufficient excuse therefor. *Allen v. Atlanta, &c. R. Co.*, 54 Ga. 503. But neither the acquittal nor conviction of such agent can have any effect in determining the right of recovery in the civil action. *Cuttingham v. Weeks*, 54 Ga. 275.

⁴ *Penn. R. Co. v. Keller*, 67 Penn. St. 300.

⁵ *Quin v. Moore*, 15 N. Y. 432; *Green*

v. Hudson River R. Co., 2 Abb. Ct. App. Cas. (N. Y.) 277; *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Dickens v. N. Y. Central R. Co.*, 23 N. Y. 158; *Kansas Pacific R. Co. v. Miller*, 2 Cal. 442; *Chicago, &c. R. Co. v. Major*, 18 Ill. 349; *Johnston v. Cleveland, &c. R. Co.*, 7 Ohio St. 336.

⁶ *Oldfield v. New York, &c. R. Co.*, 14 N. Y. 310; *Ill. Central R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Chicago, &c. R. Co. v. Shannon*, 43 Ill. 338; *Quin v. Moore*, 15 N. Y. 432. Under the Ohio statute, it is held that persons having no legal claim for support upon the deceased, may as next of kin have an action maintained for their benefit to recover the compensation allowed by statute. *Grote Meyer v. Harris*, 25 Ohio St. 510. In New Hampshire, it is held that a railway company indicted for

Where the statute is for the benefit of the husband, widow, parents, and children of the person killed, only one action can be maintained.¹ It is not deemed advisable in this work to enter particularly into a consideration of the statutes of each State, as they are quite dissimilar, but to confine the treatment of this topic to the general heads, which are applicable under most of the statutes.

SEC. 411. Actions not necessarily Local. — Actions arising under these statutes are held by some of the cases to be local, and not maintainable out of the State in which the injury was committed, although a statute giving a remedy in such cases exists in such State,² or the person injured died in the State in which the action is brought.³ But these cases are believed to rest upon an erroneous ground, and except where the statute limits the remedy to an action prosecuted in the courts of the State, the better opinion seems to be that an action may be brought and prosecuted in the courts of any State having jurisdiction of the parties;⁴ certainly so where a similar statute exists in the jurisdiction in which the action is brought.⁵ In the case cited from the United States Supreme

negligently causing the death of a person, can have no benefit from the circumstance that the heirs of the persons killed have assigned their claim. *State v. Boston, &c. R. Co.*, 58 N. H. 410.

¹ *Houston, &c. R. Co. v. Moore*, 49 Tex. 31; *Galveston, &c. R. Co. v. La Gierse*, 51 Tex. 189.

² *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Woodard v. Michigan, &c. R. Co.*, 10 Ohio St. 120; *Richardson v. N. Y. Central R. Co.*, 88 Mass. 85; *McCarthy v. Chicago, &c. R. Co.*, 18 Kan. 46; *Allen v. Pittsburgh, &c. R. Co.*, 45 Md. 41; *Mackey v. New Jersey Central R. Co.*, 14 Blatchf. (U. S.) 65; *Le Forest v. Tolman*, 117 Mass. 109.

³ *McCarthy v. Chicago, &c. R. Co.*, 18 Kan. 46.

⁴ *Dennick v. Central R. Co.*, 103 U. S. 11; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; 38 Am. Rep. 491. A provision in the Wisconsin statute excluding the jurisdiction of the Federal courts in this class of cases was held to be unconstitutional. *Chicago, &c. R. Co. v. Whitton*, 13 Wall. (U. S.) 270.

⁵ *Texas, &c. R. Co. v. Cox*, 145 U. S. 593; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Burns v. Grand Rapids, &c. R.*

Co., 113 Ind. 169; *Wabash, &c. R. Co. v. Shacklet*, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; *Cincinnati, &c. R. Co. v. McMullen*, 117 Ind. 439; *Bruce v. Cincinnati R. Co.*, 83 Ky. 174 (*overruling Taylor v. Penn. Co.*, 78 Ky. 348); *Louisville, &c. Co. v. Shivell* (Ky.), 18 S. W. Rep. 944; *Chicago, &c. R. Co. v. Doyle*, 60 Miss. 977; *Ill. Central R. Co. v. Crudup*, 63 Miss. 291; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848; *Wooden v. Western, &c. R. Co.*, 126 N. Y. 10; *Knight v. West Jersey R. Co.*, 108 Penn. St. 250. Therefore a New York administrator may recover for the death of his intestate, who was killed on a British ship on the high seas. *Cavanaugh v. Ocean Steam Nav. Co.*, 19 Civ. Proc. Rep. 391; 13 N. Y. Supp. 540. But where the killing was done in Mississippi by a corporation chartered in Alabama and Mississippi, the courts of Alabama have no jurisdiction of the cause since the action was for a tort committed by a foreign corporation in a foreign State. *Kahl v. Memphis, &c. R. Co.* (Ala.), 10 So. Rep. 661.

Whether the existence of a similar statute in the State where the action is brought is necessary or not is a mooted question. In *Wooden v. Western, &c. R.*

Court,¹ A. died in New Jersey from injuries there received, for which, if death had not ensued, B., the party inflicting them, would have been liable to an action for damages. The statute of that State provided that such an action might be brought against the party by the personal representative of the deceased. C., appointed under the laws of New York administratrix of A., brought, in a court of the latter State, a suit against B., which, by reason of the citizenship of the parties, was removed to the United States Circuit Court. It was held that the action could be maintained upon the ground that where a right of action has become fixed, either by the common law or the statute, and a legal liability has been incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. MILLER, J., in the course of an opinion in which he ably and carefully considers the questions involved, said: "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the northern district, were competent to try such a case when the parties were properly before it."² We do not see how the fact

Co., 126 N. Y. 10; *Leonard v. Navigation Co.*, 84 N. Y. 48; and in *McDonald v. Mallory*, 77 N. Y. 546, it is held that "a statute of similar import and character" must exist in the jurisdiction where the action is brought. But no such necessity is intimated in *Dennick v. Central R. Co.*, 103 U. S. 11. The question is not now so important, however, seeing that the statutes in every State are now generally sufficiently similar in their "import and character" to satisfy the rule if it exists. The only value of proving such a statute is to show that the action is not against the public policy of the State. The doctrine that no such statute is necessary is upheld by the weight of authority. *Nashville, &c. R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852; *Central R. Co. v. Swift*, 73 Ga. 651; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848; *Nelson v. Chesapeake, &c. R. Co. (Va.)*, 14 S. E. Rep. 838; *Cincinnati, &c. R. Co. v. McMullen*, 117 Ind. 439; *Louisville, &c. R. Co. v. Shivel* (Ky.), 18 S. W. Rep. 944. The only proof necessary in this regard is that "the statute of the State in which the cause of action arose

is not inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced." *Texas, &c. R. Co. v. Cox*, 145 U. S. 593.

¹ *Dennick v. Central R. Co.*, 103 U. S. 11.

² See *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelst*, 2 W. Bl. 1055; *McKenna v. Fisk*, 1 How. (U. S.) 241. In the case of *Woodard v. Michigan, &c. R. Co.*, 10 Ohio St. 121, it was held that an Ohio administrator could not maintain an action in that State under the Illinois statute giving a right of action for injuries causing death. The holding was on the ground that the Illinois statute could have no extra-territorial jurisdiction, and that the jurisdiction of the Ohio statute under which plaintiff was appointed, did not extend to trusts to be carried out in pursuance of the law of another State. A similar view was taken in *Richardson v. N. Y. Central R. Co.*, 98 Mass. 85, where a Massachusetts administrator was denied the right to sue under the New York statute. No statute existed in Massachusetts similar to that in New York,

that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey, he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else, because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases.¹ But it is said, that conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction. The statute does not say this in terms. 'Every such action shall be brought by and in the name of the personal representatives of such deceased person.' It may be admitted that for the purpose of this case the words 'personal representatives' mean the administrator. The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of the view interpolate into the statute what is not there,

but no weight was attached to this. See also as denying the right of an administrator to sue under a foreign statute, *McCarthy v. Chicago, &c. R. Co.*, 18 Kan. 46; *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679 (but in these two last cases the dissimilarity of the statutes was relied on); *Ash v. Baltimore, &c. R. Co.*, 72 Md. 144 (difference in the statutes relied on); *Texas, &c. R. Co. v. Richards*, 68 Tex. 375 (same); *St. Louis, &c. R. Co. v. McCormick*, 71 Tex. 660 (same); *Oates v. Union Pac. R. Co. (Mo.)*, 16 S. W. Rep. 487; *Marshall v. Wabash, &c. R. Co.*, 46 Fed. Rep. 269. Compare *Higgins v. Central R. Co.*, 155 Mass. 176, distinguishing the *Richardson* case, *supra*, and that of *Davis v. New York, &c. R. Co.*, 143 Mass. 301, where

a Massachusetts administrator was allowed to recover damages under the Connecticut statute for the death of his intestate. The case of *Dennick v. Central R. Co.*, 103 U. S. 11, reviewed in the text, establishes the doctrine that the administrator may sue under the foreign statute if there is nothing in it inconsistent with the statutes or general public policy of the State where the action is brought; and this is the general doctrine. See *Texas, &c. R. Co. v. Cox*, 145 U. S. 593, and other cases cited *supra*.
¹ *Ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Nashville, &c. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Great Western R. Co. v. Miller*, 19 Mich. 305.

by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here also, by construction, 'if they reside in the State of New Jersey'? It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say it depends on the appointment of an administrator within the State?"

In a New York case,¹ the court adopted a similar rule distinguishing several cases in the court of that State to the contrary,² but confines the rule to instances where the statute in the State where the injury occurred, and where the action is brought, contains similar provisions, giving or preserving a remedy. The benefits of such statutes are not confined to citizens of the State, but inure to the benefit of the class named therein, without reference to the residence of the beneficiaries, or the place where the deceased had his domicile.³

SEC. 412. Construction of these Statutes.—These statutes have received diverse constructions in the different States.⁴ In New

¹ *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. See also *Stallknecht v. Penn. R. Co.*, 13 Hun (N. Y.), 451; *Western, &c. R. Co. v. Strong*, 52 Ga. 461; *Nashville, &c. R. Co. v. Eakin*, 6 Cold. (Tenn.) 582; *Selma, &c. R. Co. v. Lacey*, 49 Ga. 106.

² The court distinguishes the following cases from the principal case: *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Beach v. Bay State S. B. Co.*, 30 Barb. (N. Y.) 433; *McDonald v. Mallory*, 77 N. Y. 547; *Mohler v. Norwich & N. Y. Trans. Co.*, 35 N. Y. 352.

³ *Nashville, &c. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341. In this case the injury occurred in Mississippi, and it was held that the action might be brought in Tennessee. *Hartford, &c. R. Co. v. Andrews*, 36 Conn. 213; *Jeffersonville R. Co. v. Swayne*, 41 Ind. 48.

⁴ The decisions are at variance as to whether a strict or a liberal construction is to be applied to such statutes. The better view seems to be that they are

remedial statutes, and should therefore receive a liberal construction. *Hayes v. Williams*, 17 Col. 468; *Soule v. New York, &c. R. Co.*, 24 Conn. 575; *Lamphear v. Buckingham*, 33 Conn. 237; *Burns v. Grand Rapids, &c. R. Co.*, 113 Ind. 169; *Merkle v. Bennington Township*, 58 Mich. 156; *Bolinger v. St. Paul, &c. R. Co.*, 36 Minn. 418; *Haggerty v. Central R. Co.*, 31 N. J. L. 349; *Beach v. Bay State Co.*, 6 Abb. Pr. (N. Y.) 415; 27 Barb. (N. Y.) 248; *Cooley's Const. Lim.* (5th ed.), p. 715. There are authorities however which hold the other way. *Pittsburgh, &c. R. Co. v. Hine*, 25 Ohio St. 629; *Jackson v. St. Louis, &c. R. Co.*, 87 Mo. 422; *Daly v. Stoddard*, 66 Ga. 145. The Kentucky statute, it is said, is to be construed liberally except as to the third section, which provides for punitive damages; that should receive a strict construction. *Shelby County v. Seearce*, 2 Duv. (Ky.) 576. The statute giving a right of action for death caused by "neglect" of the employés of a corporation

York, it is held that the statute gives a remedy whether the death was instantaneous or not;¹ and the same rule is also adopted in Tennessee, and probably in all the States where a civil remedy is given.² In Maine, however, where the proceeding is by indictment and recovery of a penalty, it is held that proceedings can only be had where the death is instantaneous, upon the ground that, inasmuch as this remedy is given for the benefit of the persons who would be entitled to a remedy if the person injured survived the injury for any space of time, the remedy by action supersedes the statutory remedy; that is, that the remedy by indictment ends when the remedy by action begins.³ But in Massachusetts the rule is otherwise.⁴ In some of the States the parties may elect their remedy,⁵ and a judgment in one action is a bar to the other.⁶ But in other States the remedies are held to be concurrent, and an action may be maintained for the intestate's damages up to the time of his death, and also another action for the injury to the survivors by the intestate's death.⁷

SEC. 413. Rules Applicable to this Class of Actions.—It is needless to say that actions under these statutes must be brought by the persons designated therein, and within the time, and in the manner

does not authorize a recovery where the death resulted from a wilful assault by a street-car driver upon a passenger. *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547. In the case of *Derby v. Kentucky Central R. Co.* (Ky.), 4 S. W. Rep. 303, a conductor on top of the train was killed, owing to the fact that the car on which he was standing was of an unusual height, which caused his head to come in contact with an over-head bridge. It was held that this did not show a case of "wilful neglect" under the statute. The Texas statute providing for liability of a principal for a death caused by the wrongful act of his agent does not embrace the case of a deputy sheriff who shoots a prisoner trying to escape. *Hendrix v. Walton*, 69 Tex. 192.

¹ *Brown v. Buffalo, &c. R. Co.*, 22 N. Y. 191.

² *Fowlkes v. Nashville, &c. R. Co.*, 5 Baxt. (Tenn.) 663; *Worden v. Humeston, &c. R. Co.*, 72 Iowa, 201.

³ *State v. Grand Trunk R. Co.*, 61 Me. 114; *State v. Maine Central R. Co.*, 60

Me. 490. See *Womaack v. Central R. Co.*, 80 Ga. 132, and *Grosso v. Delaware, &c. R. Co.*, 50 N. J. L. 317, holding that under the statutes of those States a husband had no right of action for the death of his wife, where the death was instantaneous.

⁴ *Com. v. Metropolitan R. Co.*, 107 Mass. 236.

⁵ *Hunsford v. Payne*, 11 Bush (Ky.), 380.

⁶ *Hunsford v. Payne*, 11 Bush (Ky.), 380. In *Com. v. Metropolitan R. Co.*, 107 Mass. 236, this question was left undecided.

⁷ *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Hyatt v. Adams*, 16 Mich. 180; *Barley v. Chicago, &c. R. Co.*, 4 Biss. (U. S.) 430; *Eden v. Lexington, &c. R. Co.*, 14 B. Mon. (Ky.) 204; *Long v. Morrison*, 14 Ind. 595; *Cregin v. Brooklyn, &c. R. Co.*, 75 N. Y. 192. Such also is the rule in the English courts. *Bradshaw v. Lancashire, &c. Ry. Co.*, L. R. 10 C. P. 189.

therein provided. If the statute provides that the action shall be brought by the executor or administrator of the deceased, *no other person can maintain an action*; ¹ and if the damages recovered are for the benefit of the husband, widow, parent, or next of kin, the declaration must allege the fact, and the existence of such beneficiary, as, if no beneficiary survives the deceased, no recovery can be had.² The law of the State where the injury occurred governs as to the parties to the action.³ In the trial of actions under these statutes, whether by indictment or action, the same rules of evidence prevail as would prevail if the action was brought by the deceased himself, and the negligence of the company must be established as fully in the one case as in the other;⁴ and the company is exonerated from liability if the deceased was guilty of negligence which contributed to the injury,⁵ or if the injury resulted from the negligence of a co-servant.⁶ Indeed the rule is that in order to uphold an action the injury must have been inflicted under such circumstances that the deceased, if he had survived the injury, could have maintained an action.⁷ If the deceased survived the injury, and settled with the company, but died within a year and a day from the time the injury was received, from the effect thereof, no

¹ *Wilson v. Bumstead*, 12 Neb. 1; *Nash v. Tansly*, 28 Minn. 5.

² *Schwarz v. Judd*, 28 Minn. 371.

³ *Wooden v. Western*, &c. R. Co., 12 N. Y. Supp. 908; *affirmed*, 126 N. Y. 10; 26 N. E. Rep. 1650.

⁴ *State v. Grand Trunk R. Co.*, 58 Me. 176; *Hendricks v. Western*, &c. R. Co., 52 Ga. 467; *Louisville*, &c. R. Co. v. *Connor*, 2 Baxt. (Tenn.) 382; *Baltimore*, &c. R. Co. v. *Whittington*, 30 Gratt. (Va.) 805; *Safford v. Drew*, 3 Duer (N. Y.), 627; *Woodard v. Chicago*, &c. R. Co., 23 Wis. 400; *State v. Consolidated R. Co.*, 67 Me. 479; *Com. v. Eastern R. Co.*, 5 Gray (Mass.), 473; *Terry v. Jewett*, 17 Hun (N. Y.), 395; *Creed v. Penn. R. Co.*, 86 Penn. St. 139.

⁵ *Chicago*, &c. R. Co. v. *Van Patten*, 74 Ill. 91; *Karle v. Kansas*, &c. R. Co., 55 Mo. 476; *Penn. R. Co. v. James*, 81½ Penn. St. 194; *Toledo*, &c. R. Co. v. *Grable*, 88 Ill. 441; *Starry v. Dubuque*, &c. R. Co., 51 Iowa, 419; *Cincinnati*, &c. R. Co. v. *Eaton*, 53 Ind. 307; *State v. Manchester*, &c. R. Co., 52 N. H. 528; *Willette v. Buffalo*, &c. R. Co., 14 Barb.

(N. Y.) 585; *Baker v. New Jersey*, &c. R. Co., 30 N. J. Eq. 240; *Darling v. Williams*, 35 Ohio St. 58; *Richmond*, &c. R. Co. v. *Anderson*, 31 Gratt. (Va.) 812; *Ohio*, &c. R. Co. v. *Tindall*, 13 Ind. 366; *Baltimore*, &c. R. Co. v. *Sherman*, 30 Gratt. (Va.) 602; *Pittsburgh*, &c. R. Co. v. *Collins*, 87 Penn. St. 405; *McCarty v. Delaware & Hudson Canal Co.*, 17 Hun (N. Y.), 74; *Moody v. Pacific R. Co.*, 68 Mo. 476; *Chicago*, &c. R. Co. v. *Mock*, 88 Ill. 87. In Georgia and Tennessee, the contributory negligence of the deceased may be considered in mitigation of the damages. *Yonge v. Kinney*, 28 Ga. 116; *Louisville*, &c. R. Co. v. *Howard*, 90 Tenn. 145. See *ante*, § 322 b.

⁶ *Kumler v. Junction R. Co.*, 33 Ohio St. 150; *Beauchamp Coal Co. v. Cooper*, 12 Ill. App. 373; *Proctor v. Hannibal*, &c. R. Co., 64 Mo. 112; *Sherman v. Rochester*, &c. R. Co., 15 Barb. (N. Y.) 574; *State v. Maine Central R. Co.*, 60 Me. 490; *McMillan v. Saratoga*, &c. R. Co., 20 Barb. (N. Y.) 449; *Elliott v. St. Louis*, &c. R. Co., 67 Mo. 272.

⁷ *Quincy Coal Co. v. Hood*, 77 Ill. 68.

recovery can be had under the statute, because but one compensation is contemplated.¹

SEC. 414. Damages Recoverable. — The theory of the statute is, that the next of kin, or persons designated in the statute to whom the compensation provided for therein shall be paid, have a pecuniary interest in the life of the person killed, and consequently the amount of such recovery is limited by the value of such interest.² The rule may be said to be that the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased is the true criterion by which to determine the amount of damages to be given; and in this view, evidence of the age, habits of industry, means, business, etc., of the deceased are held to be admissible.³ Such damages should be assessed as will be a just compensation to the surviving widow and children for the death of the husband and parent: but if the widow dies before the trial, the question of com-

¹ *Fowlkes v. Nashville, &c. R. Co.*, 5 Baxt. (Tenn.) 668; *Dibble v. N. Y. & Erie R. Co.*, 25 Barb. (N. Y.) 183. But see *South, &c. Ry. Co. v. Sullivan*, 59 Ala. 272, *contra*.

² *COMSTOCK, J.*, in *Quin v. Moore*, 15 N. Y. 432; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Little Rock, &c. R. Co. v. Barker*, 33 Ark. 350.

³ *Burton v. Wilmington, &c. R. Co.*, 8 N. C. 504; *Costello v. Landwehr*, 28 Wis. 532; *Baltimore, &c. R. Co. v. Trainor*, 33 Md. 452; *Atchison, &c. R. Co. v. Twine*, 9 Kan. 350; *East Tennessee, &c. R. Co. v. White*, 5 Lea (Tenn.), 540; 8 Am. & Eng. R. Cas. 65; *Georgia R. Co. v. Pitman*, 73 Ga. 325; 26 Am. & Eng. R. Cas. 474; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Telford v. Northern R. Co.*, 30 N. J. L. 188; *Donaldson v. Mississippi, &c. R. Co.*, 18 Iowa, 280; *Tilley v. Hudson River R. Co.*, 29 N. Y. 252; *Illinois Central R. Co. v. Welden*, 52 Ill. 290; *Macon, &c. R. Co. v. Johnson*, 38 Ga. 409; *Atlanta, &c. R. Co. v. Ayers*, 53 Ga. 12; *Denver, &c. R. Co. v. Woodard*, 4 Col. 1; *Kansas, &c. R. Co. v. Lundin*, 3 Cal. 94; *David v. So. Western R. Co.*, 41 Ga. 223; *Penn. R. Co. v. Butler*, 57 Penn. St. 335; *Catawissa R. Co. v. Armstrong*, 52 Penn. St. 282; *Taylor v. Western Pacific R. Co.*, 45 Cal. 323; *Kesler v. Smith*, 66 N. C. 154; *Walters v. Chicago, &c. R.*

Co., 41 Iowa, 71; *Mansfield Coal, &c. Co. v. McEnery*, 37 Leg. Int. 28.

The Tennessee rule is fully stated in the case of *Nashville, &c. R. Co. v. Smith*, 6 Heisk. (Tenn.) 179, where *DEADFRICK, J.*, speaking for the court, said: "This court has held, in the case of *Nashville, &c. R. Co. v. Prince*, 2 Heisk. 585, that, 'looking to the obvious purpose of the legislature in this alteration of the common law, we are satisfied it was intended that the representative of a person who had died from personal injuries should have the right to recover damages, not only for the mental and bodily suffering, loss of time and necessary expense resulting immediately to the deceased from the injuries, but also for the damages resulting to the party for whose benefit the right of action survives from the death consequent upon the injuries received.' Actual compensation is the measure of damages in all cases where the nature of the case admits of the application of the rules; and in cases involving mental and physical suffering that do not admit of being brought to an actual standard of value, still some reasonable proportion between the circumstances attending the injury, and the damages allowed should be observed by the jury." In this State the contributory negligence of deceased is no defence where the company neglected a statutory duty, but it may be considered in mitigation of damages.

pensation to her no longer exists, and proof on that point is irrelevant; the only question left to be determined is, what will be a just compensation to the children for the loss of the father; and in determining this question, the fact that there had been a surviving widow is to be left entirely out of the case; but the business, education, and habits of sobriety and economy of the deceased may be considered.¹ The receipt of money by those for whose benefit the action is brought, on a policy of insurance on the life of the deceased, cannot be shown to reduce the amount of recovery,² nor can the fact that by the death of deceased, plaintiff came into a large property by inheritance be considered.³ Nor can an insurance company which has paid a policy on the life of the deceased maintain an action against the wrong-doer.⁴

It is not proper to admit evidence that the deceased was the sole support of the beneficiary,⁵ nor, except in cases where exemplary damages are recoverable, to show the pecuniary condition of the defendant.⁶ Where the injury from which the person died was inflicted by the gross negligence of the company, it is held in some of the States, under peculiar statutes, that exemplary damages are recoverable.⁷ But in view of the rule that the damages must be pecu-

¹ *Taylor v. Western Pacific R. Co.*, 45 Cal. 323.

² *Sherlock v. Alling*, 44 Ind. 184; *Harding v. Townsend*, 43 Vt. 536; *North Penn. R. Co. v. Kirk*, 90 Penn. St. 20; *Carroll v. Mo. Pacific R. Co.*, 88 Mo. 236; 26 Am. & Eng. R. Cas. 268; *Althorf v. Wolfe*, 22 N. Y. 355; *Pittsburgh, &c. R. Co. v. Thompson*, 56 Ill. 138; *Kellogg v. N. Y. Central R. Co.*, 79 N. Y. 72; *Bradburn v. Great Western Ry. Co.*, L. R. 10 Exchq. 1; 11 Moak's Rep. 330; *Dalby v. India L. Ins. Co.*, 15 C. B. 365; 85 E. C. L. 364. *Contra Hicks v. Newport, &c. R. Co.*, 116 E. C. L. 401, n.

³ *Terry v. Jewett*, 78 N. Y. 346; *affirming* 17 Hun (N. Y.), 395. *Compare Beems v. Chicago, &c. R. Co.*, 58 Iowa, 150; 10 Am. & Eng. R. Cas. 658. And see remarks of BRAMWELL, B., in *Bradburn v. Great Western Ry. Co.*, L. R. 10 Exchq. 1; 11 Moak's Rep. 330.

⁴ *Conn. Mut. Life Ins. Co. v. N. Y. & New Haven R. Co.*, 25 Conn. 265; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754.

⁵ *Northwestern, &c. R. Co. v. Moranda*,

93 Ill. 302. But see *contra*, *International, &c. R. Co. v. Kindred*, 57 Tex. 491. In *Beems v. Chicago, &c. R. Co.*, 58 Iowa, 150; it was held not admissible to show, upon the question of damages, the number of the intestate's family. But it seems that it is competent to show that the beneficiary is an invalid, or "otherwise incapacitated from earning a living," and has a daughter to educate and support. *Cook v. Clay St. Hill R. Co.*, 60 Cal. 601. And in this case, where the action was in the name of the widow, it was held admissible to show that the deceased was a kind and good husband and father. But see *Quinn v. Power*, 29 Hun (N. Y.), 183, where letters from the deceased's son to his father, which tended to show his affection and good intentions towards his father and family, were held not admissible. This is upon the ground that such assurances have no legal force, and consequently no tendency to establish damage.

⁶ *Morgan v. Durfee*, 69 Mo. 469.

⁷ *Haley v. Mobile, &c. R. Co.*, 7 Baxt. (Tenn.) 239.

niary and actual, it is generally held, and as we believe correctly, that exemplary damages are not recoverable.¹ But in California the statute provides that the jury may give damages, "pecuniary or exemplary." So also in Kentucky the statute authorizes "vindictive damages," in cases of "wilful neglect."² In Missouri, the damages are to be given with reference to the "mitigating or aggravating circumstances," — which clearly contemplates exemplary damages in a proper case.³ In Texas, such damages are recoverable under the provisions of the constitution, when the death of deceased is occasioned by the "wilful act or gross negligence" of the company or its servants.⁴ And under the Virginia statute which provides that such "damages shall be recovered as to the jury may seem fair and just," it is held that exemplary damages may be given.⁵ Such damages are also held to be recoverable in some of the other States.⁶ But even in these States exemplary damages are only recoverable where they would be recoverable if the action had been brought by the deceased himself. The damages must be proved, and if there is no evidence as to pecuniary loss, only nominal damages should be given, and a verdict for substantial damages will be set aside.⁷ But in New Hampshire the

¹ See *Donaldson v. Mississippi, &c. R. Co.*, 18 Iowa, 290; 87 Am. Dec. 391; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246; *Louisville, &c. R. Co. v. Trammell*, 93 Ala. 350 (exemplary damages not recoverable though the injury was wilful); *East Tennessee, &c. R. Co. v. King*, 81 Ala. 177.

² *Louisville, &c. R. Co. v. Brooks*, 83 Ky. 137. See also *Louisville Safety Vault Co. v. Louisville, &c. R. Co.* (Ky.), 17 S. W. Rep. 567.

³ *Gray v. McDonald*, 104 Mo. 303; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286; *Nichols v. Winfrey*, 79 Mo. 544; *Smith v. Wabash, &c. R. Co.*, 92 Mo. 360; *disapproving Porter v. Hannibal, &c. R. Co.*, 71 Mo. 66, in so far as it asserts a different doctrine. See also *McGowan v. St. Louis, &c. Co. (Mo.)*, 16 S. W. Rep. 924.

⁴ *International, &c. R. Co. v. McDonald*, 75 Tex. 41; 42 Am. & Eng. R. Cas. 211; *Houston, &c. R. Co. v. Baker*, 57 Tex. 419; 11 Am. & Eng. R. Cas. 667 (father not allowed to recover such damages for the death of his son); *Galveston, &c. R. Co. v. La Gierse*, 51 Tex. 189;

Southern Cotton Press Co. v. Bradley, 52 Tex. 587.

⁵ *Matthews v. Warner*, 29 Gratt. (Va.) 570; 26 Am. Rep. 396.

⁶ *Baltimore, &c. R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Kansas, &c. R. Co. v. Miller*, 2 Col. 442.

⁷ *Houghkirk v. Del. & Hud. Canal Co.*, 92 N. Y. 219, in this case a verdict for \$5,000 was set aside, there being no proof of damage, *reversing* 28 Hun (N. Y.), 407. *Keller v. N. Y. Central R. Co.*, 2 Abb. Ct. App. (N. Y.) 480; *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310; *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; *Quin v. Moore*, 15 N. Y. 432; *Mitchell v. N. Y. Central R. Co.*, 2 Hun (N. Y.), 535; *Chicago, &c. R. Co. v. Shannon*, 43 Ill. 338; *Illinois Central R. Co. v. Welden*, 52 Ill. 290. But it has been held that when the age, habits of industry, etc., of the deceased are shown, the jury may infer substantial damages from such proof. *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; *Rockford, &c. R. Co. v. Delaney*, 82 Ill. 198; *Chicago v. Scholten*, 75 Ill. 468.

statute provides that the recovery shall be by fine not exceeding five thousand dollars nor less than five hundred dollars.

The rule of damages in this class of actions is necessarily different from what the rule would be if the action had been brought by the deceased himself. In that case the recovery would embrace damages for the personal wrong, and his mental and physical pain and suffering; but in this class of actions those elements are excluded, as also the mental anxiety, sorrow, and grief of the relatives for whose benefit a recovery is permitted,¹ except, as is the case in some of the States, the statute expressly provides that the pain and suffering of

¹ *Duckworth v. Johnson*, 4 H. & N. 633; *Oldfield v. Harlem R. Co.*, 14 N. Y. 310; *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Pym v. Gt. Northern R. Co.*, 4 B. & S. 396; *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Ohio, &c. R. Co. v. Tindall*, 13 Ind. 366; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; *Huntington, &c. R. Co. v. Decker*, 84 Penn. St. 419; *Penn. R. Co. v. Keller*, 67 Penn. St. 300; *Penn. R. Co. v. Ogler*, 35 Penn. St. 66; *North Penn. R. Co. v. Robinson*, 44 Penn. St. 175; *State v. Baltimore, &c. R. Co.*, 24 Md. 84; *Covington St. R. Co. v. Packer*, 9 Bush (Ky.), 465; *Baltimore, &c. R. Co. v. Wightman*, 29 Gratt. (Va.) 43. (But see *Baltimore, &c. R. Co. v. Noell*, 32 Gratt. (Va.) 394, where such damages were held to be recoverable.) *Porter v. Chicago, &c. R. Co.*, 21 Wis. 372; *Costello v. Landwehr*, 28 Wis. 522; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Chicago v. Major*, 18 Ill. 349; *Barley v. Chicago, &c. R. Co.*, 4 Biss. (U. S. C. C.) 480; *Chicago, &c. R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Chicago, &c. R. Co. v. Shannon*, 43 Ill. 338; *Chicago, &c. R. Co. v. Harwood*, 80 Ill. 88; *Chicago, &c. R. Co. v. Becker*, 76 Ill. 25; *Kansas, &c. R. Co. v. Cutter*, 19 Kan. 83; *Donaldson v. Mississippi, &c. R. Co.*, 18 Iowa, 280; *Jeffersonville, &c. R. Co. v. Swayne*, 26 Ind. 477; *Little Rock, &c. R. Co. v. Barker*, 33 Ark. 550; *Hyatt v. Adams*, 16 Mich. 180; *Kansas, &c. R. Co. v. Miller*, 2 Col. 442; *Dalton v. Southeastern Ry. Co.*, 4 C. B. N. s. 296. A vessel met with an accident, and sank ten minutes later, drowning libellant's

daughter. *Held*, that there could be no recovery for the fright and mental suffering endured by her during the ten minutes of suspense. *The Corsair*, 145 U. S. 335. In an action to recover damages for wrongfully causing the death of another, brought under the Illinois statute, only the amount of the actual pecuniary loss can be allowed; nothing can be added for grief or loss of society. *Brady v. Chicago*, 4 Biss. (U. S.) 448. On the trial of an action for causing death, the plaintiff, who was husband of the intestate, proved no special damage. It was held that, even if the defendant was liable, nominal damages only could be recovered. *Mitchell v. New York, &c. R. Co.*, 2 Hun (N. Y.), 535. But in an action against a railroad company to recover for the loss of services of the plaintiff's wife, by her being killed through alleged negligence of the company, an instruction that the jury might consider the loss sustained by deprivation "of regular attendance, services, and comfort of his wife's society," was held to be proper; the "comfort" could not be separated from the service. *Cregin v. Brooklyn Crosstown R. Co.*, 19 Hun (N. Y.), 341. So in an action against a railroad company by the administrator of a passenger killed on its road, who was unmarried and lived with his mother, instructions to the jury to assess the damages not only for the pecuniary loss sustained by the mother, but also for the loss of his care to her, and for her mental anguish, provided the damages did not exceed \$10,000, was held to be correct under Virginia laws. *Baltimore & Ohio R. Co. v. Noell*, 32 Gratt. (Va.) 394.

the deceased shall form an element of damage.¹ The difficulty of laying down any accurate general rule for the estimation of damages in these cases is quite apparent, and necessarily much is left to the discretion of the jury in view of the facts proved. But the courts exercise a careful supervision over such verdicts, and will set them aside if they are so excessive as to evince passion or prejudice, or are largely in excess of what the evidence warrants.² The expenses of medical attendance, nursing, funeral expenses, etc., are all elements of damage where any of the persons for whose benefit a recovery is permitted is legally bound to pay them, although all are not so bound to pay them.³ In no case, however, can damages be allowed for the mental pain and suffering of the plaintiff; the jury must be confined to the pecuniary loss sustained, and nothing can be allowed by way of *solatium* for the grief and wounded feelings of the plaintiff, or to compensate him for the loss of the society and companionship which he has suffered.⁴ This principle was set up in one of the first cases arising under the English act,⁵ and has been universally acquiesced in since that time.

In the case of an action brought for the benefit of minor children

¹ Nashville, &c. R. Co. v. Prince, 2 Heisk. (Tenn.) 580; Collins v. East Tenn. R. Co., 9 Heisk. (Tenn.) 841; Nashville, R. Co. v. Stevens, 9 id. 12; Nashville, &c. R. Co. v. Smith, 6 id. 174.

² Sherman v. Western Stage Co., 24 Iowa, 515; Nashville, &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; Penn. R. Co. v. Zebe, 33 Penn. St. 318; Chicago, &c. R. Co. v. Austin, 69 Ill. 426; Lake Shore R. Co. v. Sunderland, 2 Brad. (Ill.) 307; Etherington v. Prospect Park, &c. R. Co., 88 N. Y. 641; Chicago, &c. R. Co. v. Bayfield, 37 Mich. 205; Rose v. Des Moines Valley R. Co., 39 Iowa, 246.

³ Murphy v. N. Y. Central R. Co., 88 N. Y. 445; Petrie v. Columbia, &c. R. Co., 29 S. C. 303 (funeral expenses recoverable when it appears that they were paid by plaintiff). But expenses incurred for medical attention and for burial are not recoverable under the Oregon statute. Holland v. Brown, 35 Fed. Rep. 43. The recovery under this statute is limited solely to the probable pecuniary loss to the estate by death of deceased. Ladd v. Foster, 31 Fed. Rep. 827.

⁴ Atchison, &c. R. Co. v. Wilson, 48

Fed. Rep. 57; 4 U. S. App. 25; Illinois Central R. Co. v. Barron, 5 Wall. (U. S.) 95; Whiton v. Chicago, &c. R. Co., 13 Wall. (U. S.) 270; Little Rock, &c. R. Co. v. Barker, 33 Ark. 540; Kansas Pacific R. Co. v. Cutter, 19 Kan. 83; State v. Baltimore, &c. R. Co., 24 Md. 84; Louisville, &c. R. Co. v. Rush, 127 Ind. 545; Mobile, &c. R. Co. v. Watly, 69 Miss. 145; Mynhing v. Detroit, &c. R. Co., 59 Mich. 257; Hutchins v. St. Paul, &c. R. Co., 44 Minn. 5; Anderson v. Chicago, &c. R. Co. (Neb.), 52 N. W. Rep. 840; Hardy v. Minneapolis, &c. R. Co., 36 Fed. Rep. 657; Atchison, &c. R. Co. v. Wilson, 48 Fed. Rep. 57; Munro v. Pacific Coast Co., 84 Cal. 518; 18 Am. St. Rep. 248; Morgan v. So. Pac. R. Co., 95 Cal. 510 (this case reviews the California authorities and holds that the damages must be limited strictly to the pecuniary loss. The earlier California cases were inclined to allow damages for the loss of society where a widow sued for the death of her husband). Beeson v. Mining Co., 57 Cal. 200; Nebraska v. Central Pac. R. Co., 62 Cal. 336.

⁵ Blake v. Midland Ry. Co., 18 Q. B. 83; 83 E. C. L. 93.

for negligently causing the death of the mother, the age of the children is to be taken into account, as well as the loss of the nurture and instruction, moral and physical; and the general care and training which a mother usually bestows upon children is to be considered, without any limitation to the period of minority; and her capacity for such duties should be shown by proof.¹ As a rule the statutes provide that the jury may give such damages as they may deem fair and just with reference to the pecuniary loss sustained by the party entitled to sue.² The word "pecuniary" in this connection is to be given a liberal construction;³ and in an action by children for the death of their father, it is proper to instruct the jury that "in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father."⁴ In an action for the benefit of the widow and children, the damages are confined to such a sum "as the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for their benefit, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures," and omitting anything for grief or sorrow over his death.⁵ In a Virginia case, the

¹ *Chicago, &c. R. Co. v. Austin*, 69 Ill. 426; *Illinois Central R. Co. v. Weldon*, 52 Ill. 290.

² See *Mansfield's Digest* (Ark.), §§ 5225, 5226; *Starr & C.'s Am. Stat. of Ill. c. 70, § 1*; *Tiffany on Death*, pp. xviii-xlii.

³ *Searle v. Kanawha, &c. R. Co.*, 32 W. Va. 370; 37 Am. & Eng. R. Cas. 184; *Vicksburg, &c. R. Co. v. McLain*, 67 Miss. 4.

⁴ *Searle v. Kanawha, &c. R. Co.*, 32 W. Va. 370. In support of the same view, see *Stoher v. St. Louis, &c. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229; *Tilley v. Hudson River R. Co.*, 29 N. Y. 285; 24 N. Y. 471; *Dimmey v. Wheeling, &c. R. Co.*, 27 W. Va. 57. Compare *Chicago, &c. R. Co. v. Pounds*, 11 Lea (Tenn.), 127; 15 Am. & Eng. R. Cas. 510; *Nashville, &c. R. Co. v. Smith*, 9 Lea (Tenn.), 475. It need not be shown that the party for whose benefit the suit was brought had any claim on the deceased for support. *Petrie v. Columbia, &c. R. Co.*, 29 S. C. 303.

⁵ *Penn. R. Co. v. Butler*, 57 Penn. St. 335; *Pennsylvania Tel. Co. v. Varnau* (Penn.), 15 Atl. Rep. 624; *Hogue v. Chicago, &c. R. Co.*, 32 Fed. Rep. 365; *Illinois, &c. R. Co. v. Baches*, 55 Ill. 379; *Kansas, &c. R. Co. v. Cutter*, 19 Kan. 83; *Huntingdon, &c. R. Co. v. Decker*, 84 Penn. St. 419; *March v. Walker*, 48 Tex. 372; *Wheelan v. Chicago, &c. R. Co. (Iowa)*, 52 N. W. Rep. 119; *Lake Erie, &c. R. Co. v. Mugg*, 132 Ind. 168; *Anderson v. Chicago, &c. R. Co. (Neb.)*, 52 N. W. Rep. 840. But see *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20, where loss of society is held to be an element of damage. It is proper to charge the jury that the measure of damages depended solely on the value of the husband's life, his age and occupation, and the dangers to which he was exposed, his ability to labor for the support of his family, the probable increase or diminution of that ability; and in making such valuation the jury should determine what his gross earnings would

rule was stated to be that such damages should be assessed, (1) by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime, if he had not been killed; and (2) by adding these to the value of his services in the superintendence, attention to, and care of his family and the education of his children, of which they have been deprived by his death.¹

The damages recoverable by the widow for the death of her husband may be estimated with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future; and she is entitled to such sum as, in a pecuniary point of view, would make her whole.²

In an action by a parent to recover for the negligent killing of his minor child, it is presumed that the parent sustains a loss from the loss of such child's services, and allowance is to be made therefor;³ and it is not indispensable that there should be proof of actual services of pecuniary value rendered to the next of kin, nor that any witness should express an opinion as to the value of such services, before a recovery can be had.⁴ But in all cases where the action is by the parent, the damages must be confined to the pecuniary value of the child's services during his minority, and the expenses incurred by his parent in consequence of his injury and death.⁵ The loss of the

be, and deduct therefrom all his individual expenses during the time he was earning the same. *Central R. & B. Co. v. Rouse*, 80 Ga. 442; 5 S. E. Rep. 627. See *Young v. Kinney*, 28 Ga. 115.

¹ *Baltimore, &c. R. Co. v. Wightman*, 29 Gratt. (Va.) 431.

² *Rafferty v. Buckman*, 46 Iowa, 195.

³ *Rockford, &c. R. Co. v. Delaney*, 82 Ill. 198; *Chicago v. Hesing*, 83 Ill. 204.

⁴ The jury may infer substantial damages from the facts put in evidence without any special proof of damage. *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; 10 Am. & Eng. R. Cas. 702; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; *McGovern v. New York, &c. R. Co.*, 67 N. Y. 417; *Little Rock, &c. R. Co. v. Barker*, 39 Ark. 491; 19 Am. & Eng. R. Cas. 195. Compare *Pennsylvania Co. v. Lilly*, 73 Ind. 282; 4 Am. & Eng. R. Cas. 540.

⁵ *Rockford, &c. R. Co. v. Delaney*, 82 Ill. 198; *Walters v. Chicago, &c. R. Co.*, 36 Iowa, 458; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *State v. Baltimore, &c. R. Co.*, 24 Md. 117; *Cooper v. Lake Shore, &c. R. Co.*, 66 Mich. 262; *McGovern v. New York, &c. R. Co.*, 67 N. Y. 417; *Bunyea v. Metropolitan R. Co.*, 19 D. C. 76; *Pennsylvania R. Co. v. Kelly*, 31 Penn. St. 370; *Pennsylvania R. Co. v. Zebe*, 33 Penn. St. 318; *Pennsylvania R. Co. v. Banton*, 54 Penn. St. 495; *Augusta Factory Co. v. Davis*, 87 Ga. 648; *Ewen v. Chicago, &c. R. Co.*, 38 Wis. 13; *Potter v. Chicago, &c. R. Co.*, 21 Wis. 372; *Houston, &c. R. Co. v. Cowser*, 57 Tex. 293; *Houston, &c. R. Co. v. Mixon*, 52 Tex. 19. See also *Louisville, &c. R. Co. v. Connor*, 9 Heisk. (Tenn.) 20 (\$3000 for death of child eighteen months old not excessive); *Chicago, &c. R. Co. v. Becker*, 84 Ill. 483

child's society, and the comfort the father would have had in rearing him, are not elements of damage.¹ But in an action by an administrator who sues for the benefit of dependent father, where proof shows that the son intended to support his father after his majority, the recovery cannot be limited to the value of the deceased son's services during his minority.² If the action is brought to recover for the death of an adult child, it must be shown that it was at the time residing with the parent, or that it never had been emancipated from the family, and was at the time contributing towards the parent's support, or had promised to do so.³ Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship will warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation under the statute may be given.⁴

Testimony is admissible respecting the general nature of the employment of the decedent's father, that the jury may consider its probable effect in determining the pursuits of decedent. The Carlisle life-tables are also admissible to show the expectancy of life. The computation, however, should be made from date of dece-

(\$2000 allowed for death of child of six years); *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543. In a Georgia case, the rule is stated that the exact amount the deceased would probably have earned up to his attaining the age of twenty-one should be computed; from this should be deducted: (1) the expense of his living, and (2) something for the chances of his dying. *Young v. Kinney*, 28 Ga. 116. See also *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Pennsylvania Coal Co. v. Nee* (Penn.), 13 Atl. Rep. 841; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286. It is not error for the trial court to refuse to compel the jury to itemize the value of the probable future services of deceased. *Union Pac. R. Co. v. Dunden*, 81 Kan. 1. In a suit to recover damages for the death of a child of five years of age, the testimony of witnesses who are shown by their knowledge or experience to be qualified to express an opinion upon the pecuniary value to its parents of the services and assistance of such a child from the age named until it arrived at the age of

twenty-one years, over and above the cost of its care, education, and maintenance, is admissible, not for the purpose of controlling, but of aiding the jury in arriving at a just conclusion. *Rajnowski v. Detroit, &c. R. Co.*, 74 Mich. 72.

¹ *Mobile & Ohio R. Co. v. Watly*, 69 Miss. 145; *McGown v. International, &c. R. Co.* (Tex.), 20 S. W. Rep. 80; *Webb v. Denver, &c. R. Co.* (Utah), 24 Pac. Rep. 616; 44 Am. & Eng. R. Cas. 683; *Howard Co. v. Legg*, 93 Ind. 532; *Blake v. Midland Ry. Co.*, 18 Q. B. 93; 83 E. C. L. 93; *Bunyea v. Metropolitan R. Co.*, 19 D. C. 76. *Compare Cleary v. City R. Co.*, 76 Cal. 240; *Hyde v. Union Pac. R. Co.* (Utah), 26 Pac. Rep. 979.

² *St. Louis, &c. R. Co. v. Davis*, 55 Ark. 462. See also *Ewen v. Chicago, &c. R. Co.*, 38 Wis. 613.

³ *Penn. R. Co. v. Adams*, 55 Penn. St. 499; *Penn. R. Co. v. Keller*, 67 Penn. St. 499; *Franklin v. Southeastern Ry. Co.*, 3 H. & N. 211.

⁴ *Chicago v. Scholten*, 75 Ill. 468; *supra*, n. 4, p. 1835.

dent's death, and not from the age of twenty-one, although recovery dates from that time.¹ Substantial damages may be recovered, notwithstanding such recovery must be based upon the probable accumulation of an estate after the infant has reached his majority.² And where the action is for the benefit of a parent, evidence has been held to be admissible to show such parent's probable need of the services of the child.³ Of course where an action is brought by a husband to recover for the killing of his wife, or by a wife to recover for the killing of her husband, the relation must be proved as in other cases.⁴ Where an action is brought for the benefit of collateral next of kin whom the deceased was not legally bound to support, they must show either that they had actually been supported by him, or that there was a probability that they would have received support or pecuniary benefit from him if he had lived.⁵

SEC. 415. Limitation of Actions. — In many of these statutes it is provided that the action shall be brought within two years from the time of the death of the person injured; and in such cases there can be no question as to when the statute begins to run;⁶ and where the statute is silent upon that point, the statute begins to run from the time of the death;⁷ and this is held to be the case where the action is required to be brought by an administrator, although an administrator has not been appointed.⁸ This provision of the

¹ *Walters v. Chicago, &c. R. Co.*, 41 Iowa, 71. The Carlisle tables are admissible without proof of their authenticity. *Sellers v. Foster*, 27 Neb. 118; *Cooper v. Lake Shore, &c. R. Co.*, 66 Mich. 261; 33 N. W. Rep. 306. See also *Mississippi, &c. R. Co. v. Ayres*, 16 Lea (Tenn.), 725.

² *Walters v. Chicago, &c. R. Co.*, 41 Iowa, 71.

³ *Ewen v. Chicago, &c. R. Co.*, 38 Wis. 613.

⁴ *Toledo, &c. R. Co. v. Brooks*, 81 Ill. 245; *Conant v. Griffin*, 48 Ill. 410; *Kansas, &c. R. Co. v. Miller*, 2 Col. 442. In an action by a husband for the death of his wife, evidence that he had married a second wife, who contributed to the support of the family in like manner and to the same extent as did the first wife, is inadmissible. Such a fact cannot mitigate the damages. *Davis v. Guarnieri*, 45 Ohio St. 470.

⁵ *Dunhene v. Ohio Life & Trust Co.*,

1 Dis. (Ohio) 257; *Chicago, &c. R. Co. v. Moranda*, 93 Ill. 302; *Gratinkemper v. Harris*, 25 Ohio St. 510.

⁶ *Ewell v. Chicago, &c. R. Co.*, 29 Fed. Rep. 57 (construction of Iowa statute). See this case and also *Parish v. Eden*, 62 Wis. 272, as to what constitutes a commencement of the action.

⁷ *Waldo v. Goodsell*, 33 Conn. 432. An action may be maintained though the death did not occur within a year and a day from the time of the injury. *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626.

⁸ *Jeffersonville, &c. R. Co. v. Hendricks*, 41 Ind. 48; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Fowlkes v. Nashville, &c. R. Co.*, 5 Baxt. (Tenn.) 663; 9 Heisk. (Tenn.) 829; *Kennedy v. Burner*, 36 Mo. 128. A different doctrine obtains in Kentucky, and the time is held not to begin to run until the administrator qualifies. *Louisville, &c. R. Co. v. Sanders*, 86 Ky. 259. See also *Chiles v. Drake*,

statute is in the nature of a *condition* rather than a limitation, and cannot be enlarged for any cause, and need not be pleaded; an existing right of action is therefore not affected by a subsequent enlargement of the period of limitation.¹ This condition only applies to the statutory remedy, and has no application where the party has a remedy at common law and pursues it, — as, where a parent sues for loss of service, medical attendance, nursing, and other expenses, where a child dies of an injury inflicted by the negligence of another.²

SEC. 416. **Parties to the Action.** — The action should be brought against the person or corporation or individual who was legally in possession of, and operating, the railway at the time when the injury causing death was inflicted. If a lessee is in possession under a lease which the company had authority to execute, or if a mortgagee is lawfully in possession under a mortgage, the action can only be brought against the lessee, mortgagee, or other person or corporation lawfully in possession of the road; but if the possession although authorized by the company, yet is without legal authority, the company itself is also liable.³ But under no circumstances can the stockholders, as such, be held chargeable.⁴

The party by whom the action for such damages is to be brought is almost invariably prescribed by the statute creating the right of action, and what is said in this connection can be but little more

2 Metc. (Ky.) 146. And this latter view was at one time upheld in Connecticut. *Andrews v. Hartford, &c. R. Co.*, 34 Conn. 570. See also *Sherman v. Western Stage Co.*, 24 Iowa, 515.

¹ *Pittsburgh, &c. R. Co. v. Hine*, 25 Ohio St. 629; *The Harrisburgh*, 119 U. S. 199; *Taylor v. Cranberry, &c. R. Co.*, 94 N. C. 525; *Rugland v. Anderson*, 30 Minn. 386. See also *Benjamin v. Eldridge*, 50 Cal. 612; *Com. v. Boston, &c. R. Co.*, 11 Cush. (Mass.) 512; *Com. v. East Boston Ferry*, 18 Allen (Mass.), 589. That the limitation has expired need not be pleaded, and if the declaration or complaint shows that the action was not brought within the period it is demurrable. *Hanna v. Jeffersonville, &c. R. Co.*, 32 Ind. 13. The cases all say that there are *no exceptions*, and that in every case the action must be brought within the time limited. See *George v. Chicago, &c. R. Co.*, 51 Wis. 603, and other cases *supra*. But compare

Nelson v. Galveston, &c. R. Co., 78 Tex. 621, making an exception in the case of a posthumous child.

² *Waller v. Chicago*, 11 Ill. App. 209.

³ *Meara v. Holbrook*, 20 Ohio St. 127; *Lamphear v. Buckingham*, 33 Conn. 257; *s. p. Clement v. Canfield*, 28 Vt. 302; *Jeffersonville, &c. R. Co. v. Downey*, 61 Ind. 287; *Tracy v. Troy, &c. R. Co.*, 38 N. Y. 433; *Pittsburgh, &c. R. Co. v. Conant*, 61 Ind. 38; *Illinois Central R. Co. v. Kanouse*, 39 Ill. 272; *Cook v. Milwaukee, &c. R. Co.*, 36 Wis. 45; *Stewart v. Chicago, &c. R. Co.*, 27 Iowa, 282; *Downing v. Chicago, &c. R. Co.*, 43 Iowa, 96; *Clary v. Iowa, &c. R. Co.*, 37 Iowa, 344; *East St. Louis, &c. R. Co. v. Gibner*, 82 Ill. 632; *Burchfield v. Northern Central R. Co.*, 57 Barb. (N. Y.) 589; *Purdy v. N. Y. & New Haven R. Co.*, 61 N. Y. 353; *Gardner v. Smith*, 7 Mich. 410; *Jones v. Seligman*, 16 Hun (N. Y.), 230.

⁴ *State v. Gilmore*, 24 N. H. 461.

than a statement of the construction placed upon the different statutes.¹ At one time most of these statutes followed Lord Campbell's

¹ As to the Alabama statute, see *Louisville, &c. R. Co. v. Trammell*, 93 Ala. 350; 9 So. Rep. 870 (right of action given to personal representative only — widow's right to sue); *Williams v. South, &c. R. Co.*, 91 Ala. 635; 9 So. Rep. 77 (father's right to sue for death of son employed by company and injured by negligence of fellow-servant, §§ 2590-2593 of code of 1886 construed); *Thompson v. Louisville, &c. R. Co.*, 91 Ala. 496; 8 So. Rep. 406 (personal representative); *Grimsley v. Hawkins*, 46 Fed. Rep. 400 (father or, if he be dead, mother of child must sue for child's death); *Lovell v. De Bardelaben Coal Co.*, 90 Ala. 13; 7 So. Rep. 756 (personal representative and not father must sue under employés act, §§ 2590-2593 of code of 1886); *Bromley v. Birmingham, &c. R. Co. (Ala.)*, 11 So. Rep. 341 (evidence that deceased left wife and child is inadmissible unless it is shown that he spent part or all of his income for their benefit); *Columbus, &c. R. Co. v. Bradford*, 86 Ala. 574; 6 So. Rep. 90 (personal representative may sue without alleging that deceased left heirs).

For the Arkansas rule see, *St. Louis, &c. R. Co. v. Yocum*, 84 Ark. 493; 6 Am. & Eng. R. Cas. 617 (father must sue for death of son — mother may not sue except on proof of father's death); *Davis v. St. Louis, &c. R. Co.*, 53 Ark. 117; 13 S. W. Rep. 801 (administrator of deceased may maintain two actions; one under act of 1838 for benefit of the estate, another under act of 1883 for benefit of next of kin. *Mansf. Dig.* §§ 5523-5525 construed).

In California, see *O'Callaghan v. Bode*, 84 Cal. 489; 24 Pac. Rep. 269 (mother and sole heir of deceased may sue); *Hartigan v. Southern Pac. R. Co.*, 86 Cal. 142; 24 Pac. Rep. 851 (under § 377 only one action can be brought, and recovery by executor will bar action by the heirs).

In Colorado: *Hayes v. Williams*, 17 Col. 468; 30 Pac. 352 (right of wife to sue after expiration of one year, under § 1508 of Mill's Am. Stat.). In an action by a mother to recover for the death of her sons, under this statute allowing such an action to the heirs of the deceased person, it is sufficient to allege that plaintiff is sole

heir of deceased without averring that they were unmarried or childless. Nor is it essential that plaintiff prove that she was dependent upon decedents for her support; such proof is unnecessary except where required by statute. *Brennan v. Mining Co.*, 44 Fed. Rep. 795.

In Georgia: *Atlanta, &c. R. Co. v. Veunable*, 65 Ga. 55; 7 Am. & Eng. R. Cas. 35 (minor child may sue for death of father or mother); *East Tenn. R. Co. v. Maloy*, 77 Ga. 237; 31 Am. & Eng. R. Cas. 352 (mother living apart from her husband may sue for death of her son who was her support); *Clay v. Central R. &c. Co.*, 84 Ga. 345 (under act of Oct. 1887, amending code of 1882, § 2971, mother cannot sue for death of her son who contributed to her support unless she was dependent on him); but under same statute mother need not be wholly dependent on her son, *Daniels v. Savannah, &c. R. Co.*, 86 Ga. 236; 12 S. E. Rep. 365; *Louisville, &c. R. Co. v. Chaffin (Ga.)*, 11 S. E. Rep. 891 (temporary administrator is "personal representative" within meaning of Alabama statute and may sue in Georgia thereunder).

In Illinois: *Wabash, &c. R. Co. v. Shacklet*, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166 (foreign administrator may sue).

In Indiana: *Perry v. Carmichael*, 95 Ind. 519; 1 Am. & Eng. R. Cas. 174 (administrator may sue); *Clore v. McIntyre*, 120 Ind. 262. Unless a minor has been emancipated his father cannot, instead of suing for his death under § 266 of Rev. Stat. of 1881, sue as minor's administrator under § 284 giving personal representative the right to sue. *Berry v. Louisville, &c. R. Co.*, 128 Ind. 484; 28 N. E. Rep. 182; *following Pittsburgh, &c. R. Co. v. Vining*, 27 Ind. 513. A guardian has no right of action for the wrongful death of his ward except to reimburse the ward's estate for expenditures which he has been required to make for medical attendance, funeral expenses, etc., the right of action for general damages being in the father or mother. *Louisville, &c. R. Co. v. Goodykoontz*, 119 Ind. 111.

In Kentucky: *Bruce v. Cincinnati R.*

Act closely, but in later years modifications and additions have been made without number, and no general rules other than what have

Co., 83 Ky. 174 (personal representative is proper party when suing under laws of Tenn.); *Jordan v. Railway Co.*, 89 Ky. 40; 11 S. W. Rep. 1013; followed in Louisville, &c. R. Co. v. Meriwether (Ky.), 12 S. W. Rep. 935, *Baker v. Louisville, &c. R. Co.* (Ky.), 17 S. W. Rep. 191, and Cincinnati, &c. R. Co. v. Adam (Ky.), 13 S. W. Rep. 428, hold that right of action given Gen. Sts. c. 57, § 3, is limited to the widow and children of deceased or to administrator for their benefit, therefore when there is neither a widow nor children no right of action exists; the statute provides that the "widow, heir, or personal representative" may sue for punitive damages; the word "heir" as used means "child" and does not include parents or collateral relatives, *Henning v. Louisville Leather Co.* (Ky.), 12 S. W. Rep. 550; Louisville, &c. R. Co. v. Coppage (Ky.), 13 S. W. Rep. 1086. Kentucky Cent. R. Co. v. McGinty (Ky.), 14 S. W. Rep. 601 (father cannot sue for death of son by "wilful neglect" of railroad company); *Marvin v. Maysville St. R. &c. Co.*, 49 Fed. Rep. 436 (Kentucky statute not confined to decedents who were citizens or residents of Kentucky, nor to personal representatives appointed there); *Givens v. Kentucky Cent. R. Co.*, 89 Ky. 231 (personal representative may sue under § 1, ch. 57 of Gen'l Stat.).

In Louisiana: *Hamilton v. Morgan's S. S. Co.*, 42 La. An. 824; 8 So. Rep. 586 (infant child killed, right of action accrues and survives to its parents; but no right to punitive damages survives). The action for death of a husband and father is properly brought by the widow individually as tutrix of her infant son. Both have an equal interest in the same cause of action by inheritance. *Curley v. Illinois Cent. R. Co.*, 40 La. An. 810; 6 So. Rep. 103.

In Massachusetts: The administrator cannot sue under Mass. St. 1883, c. 243, since the employer's liability act; since the right of action is conferred on the widow or next of kin, and only one action can be maintained for the same death. *Dacey v. Old Colony R. Co.*, 153 Mass. 112; 26 N. E. Rep. 437. The statutes 1887, c. 270, § 2, gives a right of action against an em-

ployer to the next of kin dependent for support on the deceased employé. It is not necessary under this that all the next of kin should be joined. *Daley v. New Jersey Steel &c. Co.* (Mass.), 29 N. E. Rep. 507. Under this statute an invalid sister unable to work regularly or to earn enough even for her doctor's bills, who had received between thirty and thirty-five dollars a month from her brother before his death, is dependent on him and may maintain the action. *Daley v. N. J. Steel, &c. Co.* (Mass.), 29 N. E. Rep. 507. But it is held that a sister is not "dependent" where the only evidence is her own testimony that she was deceased's half-sister, that he came to see her occasionally and gave her money every other week with which to pay her rent; and that she had no other means of support. *Hodnett v. Boston, &c. R. Co.* (Mass. 1892), 30 N. E. Rep. 224.

In Michigan: *Rajnowski v. Detroit, &c. R. Co.*, 74 Mich. 20 (where damages for death of child are equally distributable between father and mother, the mother may qualify as administratrix and sue).

In Mississippi: Mississippi code (1892), § 663 (same as §1510 of Code 1880), provides that whenever the death of any person shall be caused by a wrongful act or omission under such circumstances that the deceased might have maintained an action for damages had death not ensued, "and such deceased person shall have left a widow or children, or both, or husband, or father or mother, the person or corporation that would have been liable if death had not ensued, shall be liable in damages notwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of the child for the death of an only parent; the damages to be for the use of such widow, husband, or child, except that in case a widow should have children the damages shall be distributed as personal property of the husband. In every such action the jury shall give such damages as shall be fair and just, with

been presented can be formulated that could prove of any value. A mere citation of the cases in which the various State statutes have

reference to the injury resulting from such death to the person suing; but every such action shall be brought within one year after the death of such deceased person." This action is entirely distinct from that allowed by the executor or personal representative under §§ 2078, 2079 of Code of 1880 (See Code of 1892). *Vicksburg, &c. R. Co. v. Phillips*, 64 Miss. 693; 30 Am. & Eng. R. Cas. 587. When the suit is brought by the widow for the death of a husband and father she can compromise the suit and thereby bind her children. *Natchez Cotton Mills v. Mullins*, 67 Miss. 672.

In Missouri: Rev. Stat. Mo. 1879, § 2121, provides that the suit may be brought by the wife, or "if she fails to sue within six months after such death, then by the minor children of such deceased." Under this the right of the wife to sue after the expiration of six months is conditional, and her complaint must aver that there are no minor children. *Barker v. Hannibal, &c. R. Co.*, 91 Mo. 86; 14 S. W. Rep. 280. The Rev. Stat. 1889, § 4425, provides that if deceased be a minor and unmarried the action may be brought and recovery had by "the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor." Where both sue for the death of their minor son, and one of them dies before judgment, the entire right of action survives to the other, and the suit may be continued in his or her name alone for the full amount of the recovery authorized by law. *Tobin v. Missouri, Pac. R. Co.* (Mo.), 18 S. W. Rep. 996. But this statute extends only to natural born legitimate children, and a mother cannot sue for the death of her bastard son. *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269.

In New York, an administrator appointed in that State may maintain the action without showing that there has been any administration in the foreign country where the death occurred. *Gurney v. Grand Trunk R. Co.*, 59 Hun (N. Y.), 625.

Under Pub. St. of Rhode Island, c. 204, § 20, providing that damages for an injury causing death may be recovered by action "for the use of the husband, widow, children, or next of kin" in like manner as provided in previous sections, the father cannot maintain an action for death of his son as next of kin. *Goodwin v. Nickerson* (R. I.), 23 Atl. Rep. 12.

Gen. St. of South Carolina, § 2183, excluding a right of action by an administrator where deceased before his death had recovered a final judgment for the injury, does not imply that the administrator may maintain the action in every other case; it was only intended to prevent a double remedy in any case. *Price v. Richmond, &c. R. Co.*, 33 S. C. 556; 12 S. E. Rep. 413.

Code of Tennessee (1884), § 3130, provides that the right of action of any person who dies from injuries received from a wrongdoer shall not be extinguished by his death, "but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative for the benefit of his widow or next of kin, free from the claims of creditors." § 3131 provides that the action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children may, without representative's consent, use his name in bringing the suit. By § 3132, "the action may also be instituted by the widow in her own name, or if there be no widow, by the children." Before the passage of § 3132, the action could only be in the name of deceased's personal representative. *Trafford v. Adams Exp. Co.*, 8 Lea (Tenn.), 99; *Flatley v. M.*, &c. R. Co., 9 Heisk. (Tenn.) 230; *Bledsoe v. Stokes*, 1 Baxt. (Tenn.) 314.

Where the widow elects not to sue, the administrator may sue for the benefit of her and her children; if the widow makes no objection to the suit by administrator, it does not lie in the defendant's power to do so. *Webb v. Railway Co.*, 88 Tenn. 119.

In Texas: *Houston, &c. R. Co. v. Baker*, 57 Tex. 419; 11 Am. & Eng. R. Cas. 667 (when father alone may recover

been construed is therefore furnished. It should be observed that the right of action, being entirely statutory, can only be available to the party who by the statute is authorized to maintain it. If such person is the executor or administrator, it cannot be brought by the beneficiaries;¹ and conversely, if the persons authorized to sue are those who are entitled to the benefit of the action, it cannot be brought by the executor or administrator.² Where the statute confers the right of action on the "personal representative," this term means the executor or administrator, and the widow, although deceased left no children, and she was the sole beneficiary of the amount recoverable, could not sue in her own name.³ Any other construction might subject the defendant to two separate and distinct actions for the same offence, and authorize a double recovery.

for death of son after death of wife); *International, &c. R. Co. v. Kuehn*, 70 Tex. 582; 35 Am. & Eng. R. Cas. 421 (husband of mother of infant plaintiffs has no interest in a suit by them for their father's death, and may act in the suit as their next friend); *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220; 12 S. W. Rep. 828 (wife may sue for death of her son without joining her husband, he having practically deserted her); *Nelson v. Galveston, &c. R. Co.*, 78 Tex. 621; 14 S. W. Rep. 1021 (a posthumous child may recover for father's death); *St. Louis, &c. R. Co. v. Johnston*, 78 Tex. 536; 15 S. W. Rep. 104 (a married daughter and a son nearly of age, neither of whom were supported by their father, cannot sue for his death); *Texas, &c. R. Co. v. Robertson*, 82 Tex. 657; 17 S. W. Rep. 1041 (posthumous child is a "surviving child," and may sue for his father's death); *Texas, &c. R. Co. v. Hall (Tex.)*, 19 S. W. Rep. 121 (father and mother may join in suit for death of their child); *Paschal v. Owen*, 77 Tex. 583 (right of widow where deceased left children). The right to recover *exemplary damages* is confined strictly to the class of persons described in the Constitution, namely, the surviving husband or wife or heirs of the body of deceased, and not to his parent. A parent to recover any damages at all must have a

reasonable expectation of a benefit which he would have enjoyed from deceased had death not occurred, and in the absence of any legal right to his son's services, as where son is of age, this expectation would depend upon son's ability and inclination to help his parent. *Winut v. International, &c. R. Co.*, 74 Tex. 32; *International, &c. R. Co. v. Kindred*, 57 Tex. 498; *Dallas, &c. R. Co. v. Spicker*, 61 Tex. 429. Under Rev. St. Tex., art. 2899, giving a right of action for an injury causing death, a liability for the acts of servants or agents is *confined to common carriers*; other persons being liable only for their own acts. *Asher v. Cabell*, 50 Fed. Rep. 818; *following Hendrick v. Walton*, 69 Tex. 192; 6 S. W. Rep. 749.

In Washington: *Graetz v. McKenzie*, 3 Wash. St. 194; 28 Pac. Rep. 331 (§§ 8 and 717 of Code totally repugnant; on reference to the law as it stood when code was enacted, § 8 was declared to have been enacted subsequently, to § 717, and it (§ 8) is therefore the law); *Northern Pac. R. Co. v. Ellison*, 3 Wash. St. 225; 28 Pac. 333 (same).

¹ *Tiffany on Death, etc.*, § 116; *Davis v. St. Louis, &c. R. Co.*, 53 Ark. 117.

² *Miller v. Southwestern R. Co.*, 55 Ga. 143; *Gibbs v. Hannibal*, 82 Mo. 143.

³ *Hagan v. Kean*, 3 Dill. (U. S.) 124; *Chicago v. Mayor*, 18 Ill. 349.

CHAPTER XXVII.

INJURIES TO LIVE STOCK.

SEC. 417. Company not liable for, when.
 418. Contributory Negligence.
 419. Cattle straying upon a Highway.

SEC. 420. Private Crossings, Gates, Bars, etc.
 421. Statutory Duty to Fence.
 422. Evidence: Burden of Proof.
 423. Damages.

SEC. 417. **Company not Liable for, when.** — A railway company, at the common law, is under no other or different obligation respecting the premises occupied by it than any other owner or occupant of real estate,¹ and, unless so required by statute, it is under no obligation to fence its track; and as the owner of adjoining lands is bound to restrain his cattle, it is not liable for cattle killed or injured upon its track, simply because it had omitted to erect fences or other barriers to prevent them from getting there;² and, consequently, in such

¹ *Hurd v. Rutland, &c. R. R. Co.*, 25 Vt. 116; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 228; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349.

² *Chapin v. Sullivan R. R. Co.*, 39 N. H. 53; *Hurd v. Rutland, &c. R. R. Co.*, *ante*; *Williams v. Michigan, &c. R. R. Co.*, 2 Mich. 259; *Northeastern R. R. Co. v. Sineath*, 8 Rich. (S. C.) 185; *Alton, &c. R. R. Co. v. Baugh*, 14 Ill. 211; *Perkins v. Eastern R. R. Co.*, 29 Me. 307; *Morse v. Rutland, &c. R. R. Co.*, 27 Vt. 49; *Jackson v. Rutland, &c. R. R. Co.*, 25 Vt. 150; *Vandegrift v. Delaware R. R. Co.*, 2 Houst. (Del.) 287; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *Indianapolis, &c. R. R. Co. v. Harter*, 38 Ind. 557; *Williams v. New Albany, &c. R. R. Co.*, 5 Ind. 111; *Indianapolis, &c. R. R. Co. v. McClure*, 26 Ind. 370; *Indianapolis, &c. R. R. Co. v. Kinney*, 8 Ind. 402; *Stucke v. Milwaukee, &c. R. R. Co.*, 9 Wis. 202; *Henry v. Dubuque, &c. R. R. Co.*, 2 Iowa, 288. In *Hook v. Worcester, &c. R. R. Co.*, 58 N. H. 251, a railway company was held not to be liable

for injuries to stock coming on the track through a gate left open by the land-owner, the company not being, at fault. So, in Wisconsin a similar rule was adopted under a similar state of facts. *Richardson v. Chicago, &c. R. R. Co.*, 56 Wis. 347. But where gates or bars are left open by the negligence of the company's servants, or agents, it is liable for injuries to cattle escaping upon its track by reason thereof, even though the cattle do not belong to the owner of the land. Thus, in *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 153, affirmed, 6 Hun (N. Y.), 600, it appeared that the plaintiff's cattle escaped from his enclosure in the night through the plaintiff's fence which had in some way been broken down, and passed through it to the highway, and thence through a gate erected between the highway and the defendant's tracks, but which had been left open by the defendant's servants, and some of them were killed and others injured by one of the defendant's engines run over the road. The court held that where a gate is put in a fence, erected by

cases a railroad company is only liable for injuries to cattle upon its track which result from its negligence.¹ Indeed, where a statutory duty to fence is not imposed upon the company, cattle straying upon the track are trespassers, and the owner of them is liable to the company for any injury to its trains or other property by reason of such trespass.² The right of the company to the exclusive use of its

a railroad company in pursuance of the provisions of the general railroad act, for the convenience of the owners of the adjoining land, and such gate is continually left open by the agents or servants of the company, or by those doing business with it, the fence is not maintained within the true intent and meaning of the statute, and the company is liable for any injury occasioned thereby. And that the mere fact that cattle are found upon the track without evidence of any right or authority from the company does not, of itself, establish negligence on the part of the owner of the cattle.

¹ *Turner v. St. Louis, &c. R. R. Co.*, 76 Mo. 261; *Little Rock, &c. R. R. Co. v. Henson*, 39 Ark. 413; *Orange, &c. R. R. Co. v. Miles*, 76 Va. 773; *Missouri, &c. R. R. Co. v. Wilson*, 28 Kan. 637. The owner of cattle, at the common law, is bound to keep them in. *Baltimore, &c. R. R. Co. v. Lamborn*, 12 Md. 257; *Locke v. St. Paul, &c. R. R. Co.*, 15 Minn. 350; *Vicksburgh, &c. R. R. Co. v. Patton*, 31 Miss. 156; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Vickers v. Pacific R. R. Co.*, 42 Mo. 193; *McPheeters v. Pacific R. R. Co.*, 45 Mo. 22. Cattle are regarded as free commoners in Kansas. *Union Pacific R. R. Co.*, 5 Kan. 168. In Michigan and some other States they may be so by vote of the town. *Williams v. Michigan, &c. R. R. Co.*, 2 Mich. 259; *Ohio, Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Cranston v. Cincinnati, &c. R. R. Co.*, 1 Hardy (Ohio), 193; *Murry v. So. Carolina R. R. Co.*, 10 Rich. (S. C.) 227. And while it is not negligence *per se* for the owners of cattle to permit them to run at large, yet a railway company is not liable for injuries inflicted upon them unless negligence is fairly imputable to it. In Illinois — *Chicago, &c. R. R. Co. v. Cuffman*, 38 Ill. 424; *Toledo, &c. R. R. Co. v. Fergusson*, 42 Ill. 449 — and Iowa

— *Alger v. Mississippi, &c. R. R. Co.*, 21 Iowa, 374 — cattle are permitted to run, upon the ground that there is no law against it. See also *Macon, &c. R. R. Co. v. Baher*, 42 Ga. 300; *Macon, &c. R. R. Co. v. Lester*, 30 Ga. 911. In several of the States, however, especially the Eastern States, the common-law rule prevails, and the owner of cattle must restrain them; and the fact that they are at large being *prima facie* evidence that they are so with his permission, is *prima facie* evidence of negligence on his part. *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Den. (N. Y.) 255; *Indianapolis, &c. R. R. Co. v. Harter*, 38 Ind. 557; *Louisville, &c. R. R. Co. v. Milton*, 14 B. Mon. (Ky.) 75; *Perkins v. Eastern R. R. Co.*, 29 Me. 307; *Price v. New Jersey R. R. Co.*, 31 N. J. L. 229; 32 id. 19; *Vandegrift v. Rediker*, 22 N. J. L. 185; *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 101; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428. This was formerly the rule in Illinois. *Illinois Central R. R. Co. v. Phelps*, 29 Ill. 447. In some of the States it is held that a railway company, in the absence of negligence, is not liable even though cattle escape upon the track from a well-fenced field. *North Penn. R. R. Co. v. Rehman, ante*.

² *Eames v. Salem, &c. R. R. Co.*, 98 Mass. 560. In Annapolis, &c. R. R. Co. v. Baldwin, 60 Md. —, where the company's cars were thrown off the track by a collision with the defendant's ox, which was at the time on the track, through the negligence of the owner, the railway company not being at fault, it was held that the defendant was liable. See also, to the same effect, *Drake v. Pittsburgh, &c. R. R. Co.*, 51 Penn. St. 240; *Housatonic, &c. R. R. Co. v. Knowles*, 30 Conn. 313; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Northeastern R. R. Co. v. Sineath*, 8 Rich. (S. C.) 185; *Sinram v. Pittsburgh, &c. R. R. Co.*, 28 Ind. 244;

grounds and tracks is well established, and is essential to the safe and proper conduct of its business ; and, where the common-law obligation of owners to keep their stock enclosed still exists, it is under no obligation to keep up a lookout for cattle trespassing upon its track, so far as the rights of the owners of the cattle are concerned, and is liable for

Hannibal, &c. R. R. Co. v. Kenney, 41 Mo. 272. In the Maryland case cited *ante*, ROBINSON, J., said : "The English decisions in actions of negligence fully sustain, we think, this view." In *Child v. Hearn*, L. R. 9 Exch. 176, the plaintiff, in the employment of a railroad company, was returning from his work along the line upon a trolley propelled by hand, and ran over the defendant's pigs, which had escaped from the defendant's land; the trolley was upset and the plaintiff injured. In an action of damages by the plaintiff against the owner of the pigs, it was held the owner was not liable, because the proof showed that the pigs escaped through a defect in the fence, which belonged to the company, and which it was the duty of the company to keep in repair. The liability of the defendant was not, however, questioned, if the pigs had in fact escaped from his lane through his negligence. So in *Lee v. Riley*, 18 C. B. (N. S.) 722, where the plaintiff's mare strayed into an adjoining close through defect in a fence which it was the duty of the defendant to keep in repair, and while there kicked and injured the plaintiff's horse, it was held the defendant was liable. And in *Powell v. Salisbury*, 2 Y. & J. 391, where the plaintiff's horse escaped into the defendant's close through a defective fence which it was the duty of the defendant to keep in repair, and was killed by the falling of a haystack, it was held, even in such a case as that, the damage was not too remote. And then again, in the still later case of *Lawrence v. Jenkins*, L. R. 8 Q. B. 274, where the plaintiff's cow escaped upon the defendant's land, through a fence which the defendant was bound to keep in repair, and while there ate the leaves of a yew-tree, in consequence of which the cow died, the defendant was held liable for the damage. In all these cases the court held the injury to be the consequence of the defendant's negligence, and such being the case he was liable. The first count pre-

sents quite a different question. It merely alleges that the ox was trespassing upon the road, and does not allege that it was trespassing through the negligence of the defendant. Every one, it is true, is obliged to keep his stock within his enclosures, and if they escape upon the land of another, whether through the negligence of the owner or not, and tread down the grass or destroy the crops, the owner is, in an action of trespass, liable for the damage. The common law, which requires every one to keep his stock within his own bounds at his peril, is the law of this State. But this is not an action of trespass to recover for direct and immediate injuries resulting from an estray. It is an action on the case for consequential damages resulting from the estray. And to entitle the plaintiff, in such an action, to consequential damages, he must allege and prove that the injury was the result of the defendant's negligence. If the ox escaped from his enclosures without the knowledge and without any fault of the defendant, we are of opinion he would not be liable in this action for consequential damages. There can be no reason for extending the rigorous rule of the common law, which holds the owner liable in an action of trespass, whether his cattle escape through negligence or not, to an action on the case by a railroad company seeking to recover consequential damages. It is the privilege of such companies to invade every one's property, and build and construct their road wherever they may see fit, and to do so in this State, without being obliged to erect and maintain fences along the line. Even with the best care cattle will sometimes escape from enclosures, and to hold the owner liable for consequential damages, where the escape is without his fault or negligence, would be to subject every one along the line of a railroad to the peril of being ruined, and ruined too without any fault on his part."

injuries to cattle trespassing there only when they result from the wilful misconduct of its agents, in the operation of its trains.¹ This rule has been held in New York,² Massachusetts,³ Kentucky,⁴ Kansas,⁵ Colorado,⁶ Michigan,⁷ Indiana,⁸ Pennsylvania,⁹ New Jersey,¹⁰ Rhode Island,¹¹ and Wisconsin.¹² But where, as in several States, the common-law rule as to the enclosure of stock does not exist, the owner is guilty of no negligence in allowing them to stray, and the company is liable for injuries to cattle trespassing upon its tracks, if by the exercise of ordinary care they could have been prevented.¹³ In

¹ *Drake v. Philadelphia, &c. R. Co.*, 51 Penn. St. 240; *Tower v. Providence, &c. R. Co.*, 2 R. I. 404; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Spinner v. N. Y. Central R. Co.*, 67 N. Y. 153; *Central Branch R. Co. v. Lea*, 20 Kan. 553; *Missouri Pac. R. Co. v. Dunham*, 68 Tex. 231; 31 Am. & Eng. R. Cas. 530; *International, &c. R. Co. v. Rocke*, 64 Tex. 161; 23 Am. & Eng. R. Cas. 226; *Baltimore, &c. R. Co. v. Lamburn*, 12 Md. 257; *Price v. New Jersey, &c. R. Co.*, 32 N. J. L. 19; *Bennett v. Chicago, &c. R. Co.*, 19 Wis. 145; *O'Bannon v. Louisville, &c. R. Co.*, 8 Bush (Ky.), 348; *Jeffersonville, &c. R. Co. v. Underhill*, 48 Ind. 389.

² *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Rowman v. Troy, &c. R. Co.*, 37 Barb. (N. Y.) 516; *Hance v. Cayuga, &c. R. Co.*, 26 N. Y. 428; *Mentges v. New York, &c. R. Co.*, 1 Hilt. (N. Y. C. P.) 425; *Clark v. Syracuse, &c. R. Co.*, 11 Barb. (N. Y.) 112; *Terry v. N. Y. Central R. Co.*, 22 Barb. (N. Y.) 574; *Talmadge v. Rensselaer, &c. R. Co.*, 13 Barb. (N. Y.) 493; *Marsh v. N. Y. & Erie R. Co.*, 14 Barb. (N. Y.) 364.

³ *McDonnell v. Pittsfield, &c. R. Co.*, 115 Mass. 564; *Maynard v. Boston, &c. R. Co.*, 115 Mass. 458. In this State it is held that if cattle—as in this instance a horse—are put into a pasture properly fenced, but escape therefrom into a highway, and thence go upon a railway track at a point at which the corporation is bound to, but has neglected to, maintain a cattle-guard, and are killed or injured by a train, the company is not liable unless there was reckless or wanton misconduct on the part of those operating the train. *Darling v. Boston, &c. R. Co.*, 121 Mass. 118. But see *Spinner v. N. Y. Central*

R. Co., 67 N. Y. 163; *Curry v. Chicago, &c. R. Co.*, 43 Wis. 665, holding otherwise.

⁴ *Louisville, &c. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *O'Bannon v. Louisville, &c. R. Co.*, 8 Bush (Ky.), 348.

⁵ *Central Branch R. Co. v. Lea*, 20 Kan. 353.

⁶ *Denver, &c. R. Co. v. Olsem*, 4 Col. 239. The same rule is recognized, though not applied, in *Moses v. Southern Pac. R. Co.*, 18 Oreg. 385; 42 Am. & Eng. R. Cas. 555.

⁷ *Williams v. Michigan Central R. Co.*, 2 Mich. 259.

⁸ *Jeffersonville, &c. R. Co. v. Ballard*, 48 Ind. 389; *New Albany, &c. R. Co. v. McNamara*, 11 Ind. 543; *Jeffersonville, &c. R. Co. v. Huber*, 42 Ind. 173; *Michigan Southern R. Co. v. Fisher*, 27 Ind. 96.

⁹ *North Pennsylvania R. Co. v. Rehman*, 49 Penn. St. 101; 88 Am. Dec. 491; *New York, &c. R. Co. v. Skinner*, 19 Penn. St. 298.

¹⁰ *Price v. New Jersey, &c. R. Co.*, 32 N. J. L. 19; *Vandegrift v. Rediker*, 21 N. J. L. 185.

¹¹ *Tower v. Providence, &c. R. Co.*, 2 R. I. 404.

¹² *Fisher v. Farmers' Loan, &c. Co.*, 21 Wis. 73; *Pritchard v. La Cross, &c. R. Co.*, 7 Wis. 232; *Chicago, &c. R. Co. v. Blank*, 17 Wis. 428.

¹³ *Alabama, &c. R. Co. v. McAlpine*, 71 Ala. 545; 15 Am. & Eng. R. Cas. 544; *Little Rock, &c. R. Co. v. Finley*, 37 Ark. 562; 11 Am. & Eng. R. Cas. 469; *Isbell v. New York, &c. R. Co.*, 27 Conn. 393; *Williams v. Northern Pac. R. Co.*, 3 Dak. 168; 11 Am. & Eng. R. Cas. 421; *Atchison, &c. R. Co. v. Shaft*, 33 Kan. 521; 19 Am. & Eng. R. Cas. 529; *Savannah,*

these States, however, the plaintiff cannot recover without proof of negligence on the part of the company;¹ their rule is that it is the

&c. R. Co. v. Geizer, 31 Fla. 669; 29 Am. & Eng. R. Cas. 274; Central R. Co. v. Hamilton, 71 Ga. 461; 23 Am. & Eng. R. Cas. 207; Fossier v. Morgan's Louisiana R. Co., 1 McGloin (La.), 349; Louisville, &c. R. Co. v. Wainscott, 3 Bush (Ky.), 149; Kentucky Central R. Co. v. Lebus, 14 B. Mon. (Ky.) 518; Louisville, &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75; Western Maryland R. Co. v. Carter, 59 Md. 306; Watier v. Chicago, &c. R. Co., 31 Minn. 91; 13 Am. & Eng. R. Cas. 582; Chicago, &c. R. Co. v. Jones, 59 Miss. 565; 11 Am. & Eng. R. Cas. 450; Donovan v. Hannibal, &c. R. Co., 89 Mo. 147; 26 Am. & Eng. R. Cas. 588; Jones v. Columbia, &c. R. Co., 20 S. C. 249; 19 Am. & Eng. R. Cas. 459; Trow v. Vt. Central R. Co., 24 Vt. 487. Therefore where the local law allows cattle to stray, the company must be responsible for all injuries to cattle on its track which the exercise of ordinary care in the operation of the train would have prevented. See, in addition to cases just cited, Nashville, &c. R. Co. v. Conans, 45 Ala. 437; Mobile, &c. R. Co. v. Malone, 43 Ala. 391; South, &c. R. Co. v. Brown, 53 Ala. 647, 651; McAlpine v. Alabama, &c. R. Co., 75 Ala. 113; 22 Am. & Eng. R. Cas. 602; Little Rock, &c. R. Co. v. Henson, 39 Ark. 413; 19 Am. & Eng. R. Cas. 440; Richmond v. Sacramento, &c. R. Co., 18 Cal. 351; Needham v. San Francisco R. Co., 37 Cal. 409; Toledo, &c. R. Co. v. McGinnis, 71 Ill. 346; Peoria, &c. R. Co. v. Dugan, 11 Ill. App. 233; Ill. Cent. R. Co. v. Middleworth, 46 Ill. 494; Indianapolis, &c. R. Co. v. Caldwell, 9 Ind. 397; Pittsburgh, &c. R. Co. v. Stuart, 71 Ind. 500; Baltimore, &c. R. Co. v. Mulligan, 45 Md. 486; Kuch v. Baltimore, &c. R. Co., 17 Md. 32; Vicksburg, &c. R. Co. v. Patton, 31 Miss. 156; Mississippi, &c. R. Co. v. Miller, 41 Miss. 45; New Orleans, &c. R. Co. v. Field, 46 Miss. 573; Mobile & Ohio R. Co. v. Hudson, 50 Miss. 572; Natchez, &c. R. Co. v. McNeil, 61 Miss. 434; 19 Am. & Eng. R. Cas. 518; Witherell v. Milwaukee, &c. R. Co., 24 Minn. 410; Locke v. St. Paul, &c. R. Co., 15 Minn. 350; Montgomery v. Wilmington, &c. R. Co., 6 Jones's L. (N. C.) 464; Pippin v. Wilmington, &c. R. Co., 75 N. C. 54; Winston v. Raleigh, &c. R. Co., 90 N. C. 66; 19 Am. & Eng. R. Cas. 566; Cincinnati, &c. R. Co. v. Smith, 22 Ohio St. 227; Kerwacker v. Cleveland, &c. R. Co., 3 Ohio St. 172; Cincinnati, &c. R. Co. v. Waterson, 4 Ohio St. 424; Brothers v. Railroad Co., 5 S. C. 55; Molair v. Port Royal, &c. R. Co., 31 S. C. 510; 38 Am. & Eng. R. Cas. 110; Nashville, &c. R. Co. v. Anthony, 1 Lea (Tenn.), 516; Houston, &c. R. Co. v. Terry, 42 Tex. 451; Betlegi v. Houston, &c. R. Co., 26 Tex. 604; Jackson v. Rutland, &c. R. Co., 25 Vt. 150. The operation of a train with the engine behind it was held not to be negligent where a man was stationed on the front end to keep watch, and the train was moved slowly. Falconer v. European, &c. R. Co., 1 Pugsley (N. B.), 179. Where the distance to which the light was thrown by the head-light, which was in proper order and of the best kind in use, is not shown, but only that the engineer could not perceive by its light, at thirty yards distance, a young mule of the color of the earth about a culvert in which it was fastened, and could not stop in forty yards distance, and there is no evidence as to how much of the mule was above the track, it is error to charge the jury that it was negligence to run the train at a rate of speed at which the engine-driver could not stop before reaching the mule after seeing it was on the track. Whether or not this was negligence was a question for the jury, in view of all the facts, under appropriate instructions from the court. Memphis, &c. R. Co. v. Lyon, 62 Ala. 71. Imperfect light and fog at the time of killing stock by a railroad train are circumstances that the jury may take into consideration in determining negligence. St. Louis, &c.

¹ Cincinnati, &c. R. Co. v. Bartlett, 58 Ind. 572; Turner v. St. Louis, &c. R. Co., 76 Mo. 261; Railroad Co. v. McMillan, 37

Ohio St. 554; Railroad Co. v. Heiskell, 38 Ohio St. 666.

duty of the engine-driver to keep a constant and careful lookout for stock upon the track; and although stock be wrongfully there, yet

R. Co. v. Vincent, 86 Ark. 451. See also *McMaster v. Montana Union R. Co.* (Mont.), 30 Pac. Rep. 268. The fact that the person in charge of the defendant's locomotive was a fireman, not a skilled engine-driver, is entirely immaterial in an action where the evidence shows the collision was not occasioned by any lack of skill on his part. *Culhane v. N. Y. Central, &c. R. Co.*, 60 N. Y. 133. It is the duty of a railway company to provide a sufficient number of brakes upon a train to stop it within a reasonable time and distance, and a failure to do so is negligence. *Forbes v. Atlantic, &c. R. Co.*, 76 N. C. 454. But it has been held to be negligence in a railway company to run its trains on a straight track in the nighttime, at such rate of speed that the train cannot be stopped in the distance at which the engine-driver can see cattle or other obstructions on the track by the aid of the head-light. *Memphis, &c. R. Co. v. Lyon*, 62 Ala. 71. This holding may be proper as applied to passing highway crossings, but it seems entirely unreasonable under other circumstances. So a railway company is liable for damage resulting from injury or killing of stock by its train on the railway track, when the train is moving at a greater rate of speed than allowed by law. *Houston, &c. R. Co. v. Terry*, 42 Tex. 451; *Newman v. Vicksburg, &c. R. Co.*, 64 Miss. 115; 8 So. Rep. 172; *Bell v. Kansas City, &c. R. Co.* (Miss.), 9 So. Rep. 289; *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810. But the unlawful rate of speed is not negligence *per se*. *Windsor v. Hannibal, &c. R. Co.*, 45 Mo. App. 123; *Louisville, &c. R. Co. v. Caster* (Miss.), 5 So. Rep. 388; *McConkey v. Chicago, &c. R. Co.*, 40 Iowa, 205. See also *Seawell v. Raleigh, &c. R. Co.*, 106 N. C. 272; *Story v. Chicago, &c. R. Co.*, 79 Iowa, 402. Though proof of it establishes a *prima facie* case for plaintiff. *Ohio, &c. R. Co. v. O'Donnell*, 26 Ill. App. 348. The rate of speed and the absence of signals may be shown as establishing negligence in the operation of the train. *Edson v. Central R. Co.*, 40 Iowa, 47. The rate of speed should depend upon the circumstances and locality. *Peoria, &c. R. Co. v. Miller*, 11 Ill. App. 375. In a Tennessee case, it was held error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the road, the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light. *Louisville, &c. R. Co. v. Milan*, 9 Lea (Tenn.), 223. See also *Memphis, &c. R. Co. v. Smith*, 9 Heisk. (Tenn.) 860; *Louisville, &c. R. Co. v. Connor*, 9 Heisk. 19. An owner may recover for his stock killed while running at large, if they were so at large without his fault. *Railway Co. v. Howard*, 40 Ohio St. 6; 11 Am. & Eng. R. Cas. 488; *Marietta, &c. R. Co. v. Stephenson*, 24 Ohio St. 58. And contributory negligence is not chargeable to the owner in letting the stock run at large, when it breaks out of its pasture without his fault. *Toledo, &c. R. Co. v. Johnston*, 74 Ill. 83. But where the evidence showed that the plaintiff's animal had strayed upon the defendant's track, and, despite the slackening of the speed of the train and the sounding of the whistle, the animal, instead of stepping off the track, had run ahead of the train until it had jumped into a bridge on the track and broken its leg, it was held that the defendant was not liable. In this case there was no evidence of any order of the board of commissioners directing that animals might be permitted to run at large. *Pittsburgh, &c. R. Co. v. Stuart*, 71 Ind. 500. The fact that the cattle injured were permitted to run at large will not shield the company from the consequences of the failure of its agents to observe proper care and vigilance. *Kentucky Central R. Co. v. Lebus*, 14 Bush (Ky.), 518. The permission of stock to run at

he must use ordinary care and diligence to discover it and avoid injury to it, or the company will be liable for the injury done to it.¹ And negligence cannot be inferred from the mere fact of killing.² It is not necessary that the killing should be shown to have been wantonly or wilfully done;³ but it must appear that it was negligently done, which may be established by showing that the engine-driver did not use proper precautions to avoid accident.⁴ Thus, when animals are standing on the track of a railway, and can be seen by the persons running the train, by the use of ordinary care, it is their duty to make use of the engine whistle to drive them off,⁵ and to slacken speed or stop the train, if necessary, to avoid injuring them.⁶ The engine-driver in charge of a running train should

large is not such negligence on the part of the owner as will defeat his action against a railway company for negligently killing the same. *Washington v. Baltimore, &c. R. Co.*, 17 W. Va. 190; *Kuhn v. Chicago, &c. R. Co.*, 42 Iowa, 420; *Mobile & Ohio R. Co. v. Williams*, 53 Ala. 595. If a person suffers his stock to run loose in a field through which an unfenced railroad track passes, he can only require such company to exercise ordinary care and prudence in respect to protection for such stock. *Peoria, &c. R. Co. v. Dugan*, 10 Ill. App. 233.

¹ *Kansas City, &c. R. Co. v. Watson*, 91 Ala. 483; *Alabama, &c. R. Co. v. Powers*, 73 Ala. 240; 19 Am. & Eng. R. Cas. 502; *Mobile, &c. R. Co. v. Caldwell*, 83 Ala. 196; ("a watchful lookout must be steadily maintained"); *Denver, &c. R. Co. v. Henderson*, 10 Col. 1; 31 Am. & Eng. R. Cas. 559; *Missouri Pac. R. Co. v. Gedney*, 44 Kan. 329; 45 Am. & Eng. R. Cas. 492; *Vicksburg, &c. R. Co. v. Hart*, 61 Miss. 468; 19 Am. & Eng. R. Cas. 521; *Carlton v. Wilmington, &c. R. Co.*, 104 N. C. 365; 40 Am. & Eng. R. Cas. 178; *Louisville, &c. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276; *Same v. Connor*, 9 Heisk. 19; *Washington v. Baltimore, &c. R. Co.*, 17 W. Va. 190. A different rule prevails in Arkansas, and it is held that no lookout is required to be kept. *Kansas City, &c. R. Co. v. Kirksey*, 48 Ark. 366; *Memphis, &c. R. Co. v. Kerr*, 52 Ark. 162; 40 Am. & Eng. R. Cas. 172; *disapproving Memphis, &c. R. Co. v. Sanders*, 43 Ark. 225; 19 Am. & Eng. R. Cas. 497. Compare

Little Rock, &c. R. Co. v. Finley, 37 Ark. 562.

² *McKissock v. St. Louis, &c. R. Co.*, 73 Mo. 456. See *post*, § 422.

³ *Shuman v. Indianapolis, &c. R. Co.*, 11 Ill. App. 472.

⁴ *Trout v. Virginia, &c. R. Co.*, 23 Gratt. (Va.) 619.

⁵ A failure to give the statutory signals prescribed for such cases is evidence of negligence. *Chicago, &c. R. Co. v. Fenn* (Ind. App.), 29 N. E. Rep. 790; *East Tennessee, &c. R. Co. v. Watson*, 90 Ala. 41; *Southern Kan. R. Co. v. Schmidt*, 44 Kan. 374. But it devolves on the plaintiff to show that the failure to give the statutory signals was the proximate cause of the injury. *St. Louis, &c. R. Co. v. Hurst*, 29 Ill. App. 181. But on proof of a failure by the company to give the statutory signals plaintiff establishes a *prima facie* case, and is entitled to a verdict if the company offers no evidence in explanation. *Ravenscraft v. Missouri Pac. R. Co.*, 27 Mo. App. 617; *Barr v. Hannibal, &c. R. Co.*, 30 Mo. App. 248; *Summerville v. Hannibal, &c. R. Co.*, 29 Mo. App. 48. See also *South, &c. R. Co. v. Rees*, 82 Ala. 340.

⁶ *Shuman v. Indianapolis, &c. R. Co.*, 11 Ill. App. 472; *Bostwick v. Minneapolis, &c. R. Co.* (N. Dak.), 51 N. W. Rep. 781; *Rockford, &c. R. Co. v. Rafferty*, 73 Ill. 58; *Paris, &c. R. Co. v. Mullins*, 66 Ill. 526; *South, &c. R. Co. v. Jones*, 56 Ala. 507; *Jones v. Chicago, &c. R. Co.*, 77 Wis. 585; *Senate v. Chicago, &c. R. Co.*, 41 Mo. App. 291;

always be on the lookout for obstructions, and when an obstruction is discovered, no matter when or where, should promptly resort to all means within his power, known to skilful engine-drivers, to avert the threatened injury or danger.¹ But it is not always necessary that the engine-driver should stop the train or slacken its speed, on discovering stock on the track. Ordinary prudence requires him promptly to endeavor to drive them off by sounding the whistle; but does not require him to stop or slacken the speed of the train, when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger.² And the duty to stop the train exists only when the engineer discovers or ought to have discovered the animal in dangerous proximity to the track and under circumstances indicating that either it would move on to the track or be injured if it remained where it was.³

Mobile, &c. R. Co. v. Ladd, 92 Ala. 287; *Missouri Pac. R. Co. v. Wilson*, 28 Kan. 637. Therefore the company is liable where it appears that the mule which was killed was one hundred yards ahead of the train when first seen, and that he ran three hundred yards before he was overtaken, the speed of the train being not more than twenty-two miles an hour. Such facts clearly contradict the evidence of the engineer that he used due care. *Mobile, &c. R. Co. v. Gunn*, 68 Miss. 366. It is not sufficient in such cases merely to sound the whistle in order to frighten the animal off the track. *East Tennessee, &c. R. Co. v. Burney*, 85 Ga. 635. But in some of the States it is held that the company is under no obligation to stop or even slacken the speed of its trains, where cattle are unlawfully on the track. *Durham v. Wilmington, &c. R. Co.*, 82 N. C. 252; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66; *Bemis v. Conn. & Pass. River R. Co.*, 42 Vt. 375; *Raiford v. Mississippi, &c. R. Co.*, 43 Miss. 233; *Price v. New Jersey, &c. R. Co.*, 31 N. J. L. 229; *Locke v. St. Paul, &c. R. Co.*, 15 Minn. 350; *New Orleans, &c. R. Co. v. Field*, 46 Miss. 573.

¹ *South, &c. R. Co. v. Williams*, 65 Ala. 74. The employes in charge of the train are, it is held, as much bound to exercise ordinary care to discover stock on the track in time to avoid a collision, as to prevent the collision after the stock has

been discovered. *Layne v. Ohio River R. Co.*, 35 W. Va. 438; *Kansas City, &c. R. Co. v. Watson*, 91 Ala. 483. But while the rule of the text is unquestionably correct, there is no error in refusing to instruct the jury that such is the company's duty where it appears that the animal ran from behind an obstruction and on to the track only forty feet in front of the engine while it was running rapidly. In such cases a verdict should be directed for the defendant. *Savannah, &c. R. Co. v. Jaryis* (Ala.), 10 So. Rep. 323; *Alabama, &c. R. Co. v. Moody*, 90 Ala. 46; *Yazoo, &c. R. Co. v. Smith* (Miss.), 8 So. Rep. 508. It is not negligent in the company to leave a train of freight cars standing on a siding near a crossing, the crossing itself remaining unobstructed; and where the animal came suddenly on the track in front of a rapidly approaching train and was killed, the company cannot be held liable merely on ground that but for the train of standing cars the animal could have been seen in time to avoid the injury. *Hyer v. Chamberlain*, 46 Fed. Rep. 341. An engineer has no right to take the chances of the animal's leaving the track where he has an opportunity of easily avoiding all possibility of an injury. *Elmsley v. Georgia Pac. R. Co.* (Miss.), 10 So. Rep. 41.

² *Little Rock, &c. R. Co. v. Trotter*, 37 Ark. 593.

³ *East Tenn., &c. R. Co. v. Bayliss*,

The company is never authorized to diminish the speed of its trains, however, in order to avoid injury to cattle on the track, if by so doing it augments the danger to passengers. There is no such thing as a reasonable increase of danger to passengers. Their safety must always be a paramount consideration.¹

The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employes neglected those precautions which ordinary prudence suggests as necessary to avoid casualties.² To run a train composed of six or eight cars without a brakeman is gross negligence; and where such a train is in motion, and there is apparent danger, such as to induce the engine-driver to whistle for putting on the brakes, and there is a brakeman on the train, and he fails to apply the brakes, this implies gross negligence.³ But a railway company is not chargeable with negligence in injuring live stock on its track, unless it be shown that, after the

77 Ala. 429 (Alabama rule declared); *Western R. Co. v. Listnick*, 85 Ala. 352; *Western R. Co. v. Layams*, 80 Ala. 453; 40 Am. & Eng. R. Cas. 177, *n.*; *Little Rock, &c. R. Co. v. Holland*, 40 Ark. 336; 19 Am. & Eng. R. Cas. 479; *Louisville, &c. R. Co. v. Ganotte* (Ky.), 13 Am. & Eng. R. Cas. 519; *Hannibal, &c. R. Co. v. Young*, 79 Mo. 336; 19 Am. & Eng. R. Cas. 512; *Wilson v. Norfolk, &c. R. Co.*, 90 N. C. 69; 19 Am. & Eng. R. Cas. 453; *Louisville, &c. R. Co. v. Reidmond*, 11 Lea (Tenn.), 205; 13 Am. & Eng. R. Cas. 675. But he is not bound to slacken the speed of the train merely because he sees cattle grazing near the track not at a crossing. *St. Louis, &c. R. Co. v. Russell*, 39 Ill. App. 443.

¹ *Louisville, &c. R. Co. v. Mariott* (Ky. 1884), 19 Am. & Eng. R. Cas. 509; *Sandham v. Chicago, &c. R. Co.*, 38 Iowa, 88; *East Tenn., &c. R. Co. v. Deaver*, 79 Ala. 216.

Speed and punctuality in the running of trains, as well as the safety of passengers, are paramount considerations to which private interests must yield; and that to compel a railway company to slacken the speed of its trains, or stop them, whenever an animal is seen upon the track, would impose a burden upon them which would destroy all calculations as to the arrival of trains, etc., and compel them often to choose between pecuniary loss and injuries to their

passengers, which would be unwise and unjust. *Maynard v. Boston, &c. R. Co.*, 115 Mass. 458; *Louisville, &c. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Needham v. San Francisco, &c. R. Co.*, 37 Cal. 409. But where the statute has prescribed the rate of speed at which the train may run, if it is running in excess of that rate, it is held liable for injuries resulting from its so running. *Maher v. Atlantic, &c. R. Co.*, 64 Mo. 267.

² *South & North Alabama R. Co. v. Thompson*, 62 Ala. 594.

³ *Toledo, &c. R. Co. v. McGinnis*, 71 Ill. 346. It is the duty of a railroad company to adopt for use on its trains such machinery and appliances as have been shown by actual tests to diminish the danger to human life and property incident to its business. But utility as demonstrated by use, and not the mere adoption of an invention by the best equipped roads, is the measure and standard of duty in this particular; and where the evidence shows that at the time of the accident the company was using a defective head-light, an instruction is erroneous which charges that the company is bound only to use such a head-light "as is in use on the best equipped railroads," since it does not sufficiently state the measure of the company's duty. *Alabama, &c. R. Co. v. Moody*, 92 Ala. 280.

stock was or ought to have been discovered, the company could, without imperilling the persons or property intrusted to it for transportation, have avoided the injury. Failure to ring the bell or sound the whistle does not constitute negligence *per se*; there must appear to be some necessary connection between the failure and the injury.¹

There is no liability on the part of the company for injuries to live stock not caused by an actual collision. Thus, in a case in Illinois, it appeared that through the negligence of the company in maintaining the statutory fence, the plaintiff's horse got on the track, and while there, becoming frightened by an approaching train, ran and was injured by falling into a cattle-guard. No misconduct on the part of the employes operating the train being shown, the court held that plaintiff could not recover.² In such a case, however, it would seem that unless the statute is peculiar, the company's negligence in regard to the maintenance of its fence would authorize a recovery; and this view has been taken in a well considered case in Iowa.³ But the authorities are unanimous in holding that where the animal is on the track through no fault of the company, there is no liability for injuries to it resulting from its fright or from a similar cause where there is no actual collision with the train, and no wilful misconduct on the part of the train operatives.⁴

¹ *Wallace v. St. Louis, &c. R. Co.*, 74 Mo. 594; *ante*, § 323. See also *Maynard v. Boston, &c. R. Co.*, 115 Mass. 158.

² *Schertz v. Indianapolis, &c. R. Co.*, 107 Ill. 577; 15 Am. & Eng. R. Cas. 523. The same view is taken in *Pennsylvania Co. v. Dunlap*, 112 Ind. 93; 31 Am. & Eng. R. Cas. 512 (in view of the peculiar statute of Indiana); *Croy v. Louisville, &c. R. Co.*, 97 Ind. 126; 19 Am. & Eng. R. Cas. 608; *Lafferty v. Hannibal, &c. R. Co.*, 44 Mo. 291; *Peru &c. R. Co. v. Haskett*, 10 Ind. 409.

³ *Liston v. Central Iowa R. Co.*, 70 Iowa, 714; 26 Am. & Eng. R. Cas. 593. The same view is taken in *Meeker v. Northern Pac. R. Co.*, 21 Oreg. 513; *Missouri Pac. R. Co. v. Gill*, 49 Kan. 447. In this last case the mare was pasturing on defendant's right of way at a point where it should have been fenced. Becoming frightened at the approach of a train she ran along the right of way and into a wire fence constructed at right angles with the

track. It was held that the company was liable, *following Atchison, &c. R. Co. v. Jones*, 20 Kan. 527.

⁴ *International, &c. R. Co. v. Hughes*, 68 Tex. 290; 31 Am. & Eng. R. Cas. 569; *Knight v. New York, &c. R. Co.*, 99 N. Y. 25; 23 Am. & Eng. R. Cas. 188, 190, *n.*; *Richmond, &c. R. Co. v. Buice*, 88 Ga. 180; *Gay v. Wadley*, 86 Ga. 103; *Burlington, &c. R. Co. v. Shinmaker*, 18 Neb. 369; 22 Am. & Eng. R. Cas. 565; *Lowry v. St. Louis, &c. R. Co.*, 40 Mo. App. 554; *Seibert v. Missouri, &c. R. Co.*, 72 Mo. 565; 6 Am. & Eng. R. Cas. 583; *Foster v. St. Louis, &c. R. Co.*, 90 Mo. 116; *East Tennessee, &c. R. Co. v. Waters*, 77 Ga. 69; *Holder v. Chicago, &c. R. Co.*, 11 Lea (Tenn.), 176; 13 Am. & Eng. R. Cas. 567, 570. So where a mare is frightened by a train and runs into a wire fence, the company cannot be held liable. *Texas, &c. R. Co. v. Mitchell* (Tex. App.), 17 S. W. Rep. 1079. See also *St. Louis, &c. R. Co. v. Felton* (Tex.), 14 S. W. Rep.

In a recent case before the Supreme Court of North Carolina,¹ it appeared that the horse, for the death of which the action was brought, had suddenly run upon the track from among high weeds and bushes on the right of way, which prevented its approach being seen. It was held that it was error for the trial court to instruct the jury that it was negligence for a railroad company to allow weeds and bushes in close proximity to the track, and that if the injury resulted because the horse was so concealed that the engineer could not see him until it was too late, the company is liable. The court held that it would take judicial notice of a universal custom of railroad companies to allow abutting land-owners to cultivate part of the right of way, and would refuse to oust such owners from the enjoyment of the privilege.

SEC. 418. Contributory Negligence. — Where the owner of cattle is guilty of negligence which proximately contributes to the injury

1072; *Railroad Co. v. Ritter* (Tex.), 16 S. W. Rep. 909. In the case of *Meeker v. Northern Pacific R. Co.*, 21 Oreg. 513; 49 Am. & Eng. R. Cas. 518, it appeared that the statute made the company liable for killing or injuring stock "upon or near any unfenced track . . . whenever such killing or injury is caused by any moving train or engine or cars upon such track." Owing to the right of way being unfenced, plaintiff's horse strayed thereon, and becoming frightened by the approach of an engine, fled down the track and was injured by falling into a trestle. The court held that the company was nevertheless liable under the statute; that the fact the engine did not come in contact with the animal would not release it from liability since the real and proximate cause of the injury was the failure to fence the track as required by statute.

In the case of *Jamison v. Southwestern R. Co.*, 75 Ga. 444, which was an action to recover damages for the death of a dog, the court denied a recovery on the ground that a dog was not property either at common law or under the statutes of the State, except in a qualified sense, but that he remained a *fera natura*. No action would lie therefore except where the killing was wilful and malicious. In the case of *Jones v. Bard*, 40 Fed. Rep. 281; 40 Am. & Eng. R. Cas. 191, which was a similar action, recovery was denied on the ground that

the evidence did not show negligence. The court maintained that more was to be expected of a dog in taking care of himself than of ordinary live stock. In Texas, however, it is held that recovery may be had for the negligent killing of a dog. *St. Louis, &c. R. Co. v. Hanks*, 78 Tex. 300; 45 Am. & Eng. R. Cas. 521. But the company is not bound to fence road against dogs; they are not included in the term "stock." *Texas, &c. R. Co. v. Scott* (Tex.), 16 S. W. Rep. 1116 (company held not liable for death of a dog which went under the train and was run over when the train started).

¹ *Ward v. Wilmington &c. R. Co.* (N. C.) 49 Am. & Eng. R. Cas. 540.

If the claim agent of the railroad company acting within the scope of his duties, and with a knowledge of the circumstances, takes possession of the carcass of a cow killed by a railroad train, and orders it to be sold for the benefit of the company, this constitutes *prima facie* an admission of the negligence of the company in killing the cow. *McCauley v. Montana Central R. Co.* (Mont.), 49 Am. & Eng. R. Cas. 557. This holding, however, was under a statute providing that in case of injury to live stock through the negligence of the company, the body of the animal shall belong to the company, unless the owner shall elect to take the same in whole or in part for the damages.

or killing of his cattle upon a railway, he cannot recover therefor;¹ and the question as to whether he was guilty of such contributory negligence is generally one of fact to be determined by the jury in view of the circumstances; and especially is this the case when the question is open to doubt or debate.² If a person wantonly or carelessly drives stock upon the track of a railroad, he is guilty of contributory negligence; and if the stock is injured, he cannot recover.³ But where cattle escape from their owner's land upon an adjoining railway and are killed by an engine, the mere fact that the owner turned them upon his land where there was no fence between it and the railway, when it was the legal duty of the company to build it, is not proof of contributive negligence on his part.⁴ But if a horse

¹ *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454; *Indianapolis, &c. R. R. Co. v. Caudle*, 60 Ind. 112; *Toledo, &c. R. R. Co. v. Head*, 62 Ill. 233; *Jeffersonville, &c. R. R. Co. v. Adams*, 43 Ind. 402; *Cincinnati, &c. R. R. Co. v. Street*, 50 Ind. 225; *Williams v. Northern Pacific R. R. Co.*, 11 Am. & Eng. R. R. Cas. (Dak.) 421.

² *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665; *Evans v. St. Paul, &c. R. R. Co.*, 30 Minn. 489; *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450; *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360.

³ *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454.

⁴ *Wilder v. Maine Central R. R. Co.*, 65 Me. 332. In several of the States the common-law rule, which requires the owner of cattle to keep them upon his own land, does not prevail. *Burgwyn v. Whitfield*, 81 N. C. 261; *Studwell v. Ritch*, 14 Conn. 292; *Russell v. Hanley*, 20 Iowa, 219; *Stoner v. Shugart*, 45 Ill. 76; *Headen v. Rust*, 39 Ill. 186; *Seeley v. Peters*, 10 Ill. 130. And the mere fact that he permits them to stray from his land does not release the company from its obligation to use ordinary care. *Chicago, &c. R. R. Co. v. Engle*, 84 Ill. 397; *Toledo, &c. R. R. Co. v. Deacon*, 63 Ill. 91; *Rockford, &c. R. R. Co. v. Rafferty*, 73 Ill. 58; *Toledo, &c. R. R. Co. v. Ingraham*, 58 Ill. 120; *Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Cincinnati, &c. R. R. Co. v. Smith*, 22 Ohio St. 227; *Laws v. North Carolina R. R. Co.*, 7 Jones (N. C.), 468;

Alger v. Mississippi, &c. R. R. Co., 10 Iowa, 268; *Kuhn v. Chicago, &c. R. R. Co.*, 42 Iowa, 420; *Smith v. Chicago, &c. R. R. Co.*, 34 Iowa, 506; *Evans v. Burlington, &c. R. R. Co.*, 21 Iowa, 374; *Balcom v. Dubuque, &c. R. R. Co.*, 21 Iowa, 102; *Whitbeck v. Dubuque, &c. R. R. Co.*, 21 Iowa, 103; *Marietta, &c. R. R. Co. v. Stevenson*, 24 Ohio St. 48; *Coyle v. Baltimore, &c. R. R. Co.*, 11 W. Va. 94; *Baylor v. Baltimore, &c. R. R. Co.*, 9 W. Va. 270; *Georgia, &c. R. R. Co. v. Neeley*, 56 Ga. 540; *Vicksburgh, &c. R. R. Co. v. Patton*, 31 Miss. 156; *Raiford v. Mississippi, &c. R. R. Co.*, 43 Miss. 233; *Mississippi, &c. R. R. Co. v. Miller*, 40 Miss. 45; *Tarewater v. Hannibal, &c. R. R. Co.*, 42 Mo. 193; *McPheeters v. Hannibal, &c. R. R. Co.*, 45 Mo. 22; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Hannibal, &c. R. R. Co. v. Kenney*, 41 Mo. 271. If the owner of cattle knowingly permits them to run at large in the vicinity of a railway, where it is not required by law to be fenced, and they stray upon the track and are killed, it not appearing that the killing is wilfully done, the company will not be liable, although the owner may not have known that the railway was completed. *Jeffersonville, &c. R. R. Co. v. Adams*, 43 Ind. 402. But it is not conclusive evidence of contributory negligence to allow cattle to run at large in a pasture next to a railway where the railway fence is out of repair. *Evans v. St. Paul & Sioux City R. R. Co.*, 30 Minn. 489. And whether, in exercising his right to use his land, the land-owner has been guilty of negligence

escapes from the control of the owner's agent through his negligence, and, after running six hundred and fifty feet, enters upon the tracks

contributing to an injury to his cattle, is ordinarily a question of fact for a jury, to be determined with reference to all the circumstances of the case. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is not such negligence on the part of the land-owner, in law; notwithstanding the company's road is unfenced, and notwithstanding there is another railroad within a few hundred feet. *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360. Thus, in an Iowa case, it was held that the question whether or not the owner of a blind horse was guilty of negligence in turning out the horse to graze where he might be exposed to danger from passing railroad trains was properly submitted to the jury. *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450. In a Wisconsin case the plaintiff, living about three-fourths of a mile from defendant's line, which he knew to be unfenced, permitted his cow to pasture in summer on a large tract of unenclosed land, extending from the neighborhood of his residence to the track; and she passed upon the track and was injured. It was held that upon these facts the question of contributory negligence, being open to doubt and debate, was for the jury. *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665. The court cannot say to the jury, as a matter of law, that permitting cattle to run at large is negligence which contributed to their injury, as it depends upon all the circumstances whether it was negligence and whether it contributed to the injury. *Cincinnati, &c. R. R. Co. v. DuCharme*, 4 Brad. (Ill.) 178. Where a railway company fails to fence its road, and stock is killed by its trains in a county where it is lawful for stock to run at large, the question of contributory negligence, in the owner permitting his stock to run at large, cannot arise. *Ohio & Mississippi R. R. Co. v. Fowler*, 85 Ill. 21. And where cattle are killed by a locomotive on a railroad running along unenclosed lands, but not at a railroad crossing, the fact that the cattle got upon the track from land adjoining that of the owner of the cattle, and upon which they had strayed, is no

defence to an action for damages against the railroad. *Kaes v. Mo. Pacific R. R. Co.*, 6 Mo. App. 397. The owner of animals, in allowing them to be at large on the range of unenclosed lands, is not chargeable with an unlawful act or an omission of ordinary care in keeping his stock, subject to the qualification, however, that animals which are unruly or dangerous are required to be restrained. The bare fact that the railway is unfenced will not render it liable for killing stock. *Blaine v. Chesapeake, &c. R. R. Co.*, 9 W. Va. 252. But if an animal is allowed to run at large in the vicinity of a railroad at a point where it was not fenced, and could not legally be fenced, the owner cannot recover for its injury. *Cincinnati, &c. R. R. Co. v. Street*, 50 Ind. 225. So, where cattle are running at large in an extra-hazardous place near a railway, the railway company is only liable for wanton and reckless neglect in their injury. *Williams v. Northern Pacific R. R. Co.*, 11 Am. & Eng. R. R. Cas. (Dak.) 421. In Nebraska, under the statute, a railway company is liable for stock killed upon its track while running at large in the night-time at a point where the company was required, but failed, to fence its track, notwithstanding stock is prohibited by statute from running at large in the night-time. *Burlington, &c. R. R. Co. v. Brinkman*, 14 Neb. 70. But in Iowa a railway company is released from the duty of exercising ordinary care toward animals required to be kept in an enclosure, which may have strayed upon its track, only when the animal is at large by the sufferance of the owner. *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497. But, generally, where it appears that the injured stock was permitted to run at large in violation of law, the question whether the owner of the stock has been guilty of contributory negligence is one of fact, to be determined by the jury from the circumstances of the case. *Ewing v. Chicago, &c. R. R. Co.*, 72 Ill. 25; *Rockford, &c. R. R. Co. v. Irish*, 72 Ill. 404. The better rule seems to be, where a railway company is not guilty of negligence in failing to protect its

of a railway company at a point where there are no barriers, and after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might, in their judgment, fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover.¹ Where, however, a person's cattle get upon a railway track without fault on his part,² as, if they escape from a well-fenced field³ or from the custody of the owner or his servant without fault on their part while driving them along a highway, he is not precluded from a recovery if they are injured or killed by the negligence of a railway company on whose track they escaped. Indeed, the negligence of a party must be the immediate, proximate cause of an injury, to render him liable therefor; and the same rule applies to the contributory negligence which would relieve him from liability. An instruction which stated that the negligence of the plaintiff must have contributed "directly" to the injury, to excuse the defendant, was held to come within the rule.⁴ In an action

track from swine, in a township where they are not permitted to run at large, and it appears that an animal is killed by the negligence of the railroad company, and that the negligence of the owner in permitting the animal to run at large, in violation of the statute, contributed directly to the injury, that the negligence of the defendant is offset by the negligence of the plaintiff, and the owner of the animal cannot recover. *Kansas City, &c. R. R. Co. v. McHenry*, 24 Kan. 501. If domestic animals are on the track of a railroad by the fault of the owner, the owner takes all reasonable risks of injury to them from passing trains; and while the railroad company is not bound to presume that such animals will be upon the track, they are not authorized to injure them wilfully or carelessly, but are bound to use reasonable care to avoid injuring them. But considering the relative value and importance of a train, and of the lives of the persons upon it, as compared with the value of domestic animals, a proper regard for both train and cattle would make the duty to avoid injury to the train, and to those upon it, primary and paramount to the duty of avoiding injury to the cattle. *Witherell v. Milwaukee, &c. R. R. Co.*, 24

Minn. 410; *O'Connor v. Chicago, &c. R. R. Co.*, 27 Minn. 166. In Pennsylvania it is held that a railway company is not liable for injuries to cattle straying upon its track, unless it is wantonly or wilfully inflicted. *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Drake v. Phila. &c. R. R. Co.*, 51 Penn. St. 240.

¹ *Amstein v. Gardner*, 134 Mass. 4.

² *Trout v. Virginia, &c. R. R. Co.*, 23 Gratt. (Va.) 619.

³ *Somner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Toledo, &c. R. R. Co. v. Milligan*, 52 Ind. 505; *Chicago, &c. R. R. Co. v. Harris*, 54 Ill. 428; *Toledo, &c. R. R. Co. v. Johnston*, 74 Ill. 83; *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497; *Bulkley v. N. Y. & New Haven R. R. Co.*, 27 Conn. 479; *Chicago, &c. R. R. Co. v. Goss*, 17 Wis. 428.

⁴ *Gates v. Burlington, &c. R. R. Co.*, 39 Iowa, 45; *Towne v. Nashua, &c. R. R. Co.*, 124 Mass. 110; *White v. Concord R. R. Co.*, 30 N. H. 188; *Housatonic R. R. Co. v. Waterbury*, 23 Conn. 101; *Horn v. Atlantic, &c. R. R. Co.*, 35 N. H. 169. Indeed, in those States in which the common-law rule as to the owner's duty to restrain cattle prevails, cattle which are at large upon a highway are treated as

against a railway company for damages for loss caused by the latter's negligence, an instruction to the effect that the plaintiff could recover, if he showed by a preponderance of evidence that the loss resulted from the negligence of the defendant, was held defective in failing to instruct the jury that the plaintiff could not recover if his own negligence contributed to the loss.¹ In an action for the value of the plaintiff's horse, which escaped upon the defendant's railway from an adjoining field and was killed by a train, in consequence of a defect in the defendant's fence at that place, it was held that if it had appeared that the horse was breachy, and accustomed to jump or break lawful fences, and that the plaintiff, knowing these facts, turned him loose in the field adjoining the track, the jury might have found upon this evidence that the plaintiff was guilty of contributory negligence, though the court could not so hold as a matter of law.² It is held in some of the cases not to be conclusive evidence of negligence for the owner of cattle knowingly to permit them to run at large in a pasture next to a railroad track, where the fence is out of repair,³ and that whether it is or not is a question of

trespassers, and their owners as wrongdoers; and if they stray upon the track at a point where the company is not bound to fence, the latter is not liable unless the injury is inflicted by gross negligence, which may be said to be wilful. *McDonnell v. Pittsfield, &c. R. R. Co.*, 115 Mass. 164; *Halloran v. N. Y. & Harlem R. R. Co.*, 2 E. D. S. (N. Y. C. P.) 257; *Fitch v. Buffalo, &c. R. R. Co.*, 13 Hun (N. Y.), 668; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516; *Hance v. Cayuga, &c. R. R. Co.*, 26 N. Y. 428. But holding the company liable for mere negligence, see *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Indianapolis, &c. R. R. Co. v. McKinney*, 24 Ind. 283; *Chicago, &c. R. R. Co. v. Morrow*, 67 Ill. 218; *Springfield, &c. R. R. Co. v. Andrew*, 68 Ill. 57.

¹ *McCormick v. Chicago, Rock Island & Pacific R. R. Co.*, 47 Iowa, 345.

² *Jones v. Sheboygan, &c. R. R. Co.*, 42 Wis. 306.

³ *Evans v. St. Paul R. R. Co.*, 30 Minn. 489; *Ohio, &c. R. R. Co. v. Fowler*, 85 Ill. 21; *St. Louis, &c. R. R. Co. v. Ladd*, 36 Ill. 409; *Toledo, &c. R. R. Co. v. Ferguson*, 42 Ill. 449; *Corwin v.*

N. Y. & Erie R. R. Co., 13 N. Y. 42; *Brady v. Rensselaer R. R. Co.*, 1 Hun (N. Y.), 378. In this case, a cow was left in charge of a boy who drove her upon an unenclosed lot near the defendant's track, and left her for a short time, and she strayed upon the track and was killed by a train. It was held that the plaintiff was entitled to recover. *MILLER, P. J.*, said: "*In Bowman v. Troy, &c. R. R. Co.*, 37 Barb. (N. Y.) 516, it was held that where one suffered his cow to be at large in a public street, and on the track of a railroad in a city, apparently alone and unattended, with no one to take charge of her, and where it did not appear that she was in the vicinity of the plaintiff's residence, or had been previously taken care of by him, or had escaped without his fault, or was lawfully travelling along the street, that he could not recover for injuries to the cow, happening through the negligence of the railroad company. This was an extreme case, and differs essentially from the case at bar, for here the cow was kept and fed in the plaintiff's stable, and only allowed to go out in charge of a boy employed for that purpose, and then not very far from the plaintiff's residence. The plaintiff had taken every precaution to

fact for the jury, in view of the circumstances.¹ But where the company is not in default as to the erection and repair of the fence,

guard against danger or accident, and it was the absence of the boy, without the knowledge or consent of the plaintiff, which enabled the cow to stray upon the defendant's track, where she was killed. There is a class of cases which holds that where the defendant was in default, the negligence of the owner in permitting the animal to run at large in the highway, or to trespass upon the premises of a neighbor, is not a defence. *Munch v. N. Y. Central R. R. Co.*, 29 Barb. (N. Y.) 647; *Suydam v. Moore*, 8 Barb. (N. Y.) 358. I am inclined to think that the judgment may be upheld within the principle here laid down, and that the temporary absence of the boy in charge of the cow was no defence. Even if it may properly be urged that there was a question of plaintiff's negligence in the case, I am not prepared to say that it was not for the jury to determine, under all the circumstances, whether there was negligence. But, independent of these considerations, I think that the case may properly be disposed of upon another ground. The defendant was bound to erect and maintain fences, and to construct and maintain cattle-guards at their crossing, near which the cow was run over. This had been done, but when the accident occurred the fence was temporarily removed, for the purpose of repairing the track, and there was evidence to show that the cattle-guard at the crossing was defective and insufficient, so that cattle could walk over the same. The defendant was clearly liable within the principle laid down in *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 49, by DENIO, J., that the design of the section was to require the railroad company to enclose their tracks with substantial fences, and to guard them by ditches called cattle-guards, and that one method provided for securing that object was the provision charging the companies which had disregarded the statute with damages for all injuries done to animals, and that it was not material from whence, or under what circumstances, the animals came upon the track, provided they were enabled to get there by the absence of cattle-guards. As was said in

Bradley v. N. Y. & Erie R. R. Co., 34 N. Y. 432, 'It is no excuse that the cattle, horses, etc., were at large in violation of law.' The exceptions to this general rule are, where it appears that the plaintiff drove his cattle on the road and left them there, or did some positive act increasing the danger of his cattle, or in a case where a party voluntarily permits his cattle to stray upon the railroad track. *Corwin v. N. Y. & Erie R. R. Co.*, *ante*; *Poler v. N. Y. Central R. R. Co.*, 16 N. Y. 480. As the case stood, there was no question of contributory negligence to submit to the jury; for even if the plaintiff had known of the defects of fence or cattle-guards, it would have been no defence." *Shepard v. N. Y. & Erie R. R. Co.*, 35 N. Y. 644; *Louisville, &c. R. R. Co. v. Whitrell*, 68 Ind. 297; *Knight v. Toledo, &c. R. R. Co.*, 24 Ind. 402; *Jeffersonville, &c. R. R. Co. v. Dunlap*, 29 Ind. 426; *Louisville, &c. R. R. Co. v. Cahill*, 63 Ind. 340; *Toledo, &c. R. R. Co. v. Cary*, 37 Ind. 172; *McCoy v. California, &c. R. R. Co.*, 40 Cal. 532; *Rogers v. Newburyport R. R. Co.*, 1 Allen (Mass.), 16; *Wilder v. Maine Central R. R. Co.*, 65 Me. 332. But see *Dayton, &c. R. R. Co. v. Miami County Infirmary*, 32 Ohio St. 566.

¹ *Schubert v. Minneapolis, &c. R. R. Co.*, 27 Minn. 360; *Hammond v. Sioux City, &c. R. R. Co.*, 49 Iowa, 450; *Estes v. Atlantic, &c. R. R. Co.*, 63 Me. 308; *Rockford, &c. R. R. Co. v. Irish*, 72 Ill. 404; *Pitzner v. Shinnick*, 39 Wis. 120; *Cairo, &c. R. R. Co. v. Woolsey*, 85 Ill. 370; *Curry v. Chicago, &c. R. R. Co.*, 48 Wis. 665; *Cincinnati, &c. R. R. Co. v. Ducharme*, 4 Brad. (Ill.) 178. So, too, the question whether or not the company was guilty of negligence in killing the cattle is one of fact to be found by the jury. *Pearson v. Milwaukee, &c. R. R. Co.*, 45 Iowa, 497. In *Bulkley v. N. Y. & New Haven R. R. Co.*, 27 Conn. 479, the plaintiff had driven his cows home after dark in the evening, and left them in the highway in front of his house, intending to milk them there, and then put them into his enclosure, and while they were so left went into his house for a short time.

the contributory negligence of the plaintiff will defeat a recovery.¹ Every person is bound to use ordinary care to save his property from injury or destruction, and not having done so he cannot saddle upon another a loss resulting to it.²

SEC. 419. **Cattle straying upon a Highway.** — Nor, if a railway company has discharged its duty as to the erection of cattle-guards is it liable for injuries to cattle escaping upon its track from highways, when they have been turned into the highway by the owner, to graze or for other purposes, unless the injury is wilfully or wantonly inflicted;³ or, as held in some of the States, unless the injuries resulted from the negligence of the company.⁴ Depot-grounds, as a rule, cannot be fenced, at least without great inconvenience to the company and the public, and generally are not required to be; and where cattle straying upon the highway escape upon the track over such grounds, or at any point where the company is not required to erect a fence, it can only be held responsible for injuries wilfully inflicted;⁵ and the same is also true where it is impossible to fence

While he was gone they strayed away, and he searched for them until eleven o'clock at night. About ten o'clock at night they were run over by the defendants' cars. The railroad was about a mile from the plaintiff's house, and he had not searched in that direction. The suffering of cattle to run at large was forbidden by statute. The judge charged the jury that the plaintiff had a right to place his cows in the highway for the temporary purpose of milking them, and that if he left them there intending to milk them within a reasonable time and then to put them into his enclosure, and exercised ordinary care for the purpose of keeping them, he was not to be regarded as having suffered them to go at large within the meaning of the statute, and was not guilty of such negligence as would prevent his recovery. It was held, on motion of the defendants for a new trial, that the question of negligence was properly one of fact for the jury, but that, so far as it could be treated as involving any legal question, the law was properly stated in the charge. Toledo, &c. R. R. Co. v. Johnston, 74 Ill. 83; Bennett v. Chicago, &c. R. R. Co., 19 Wis. 145; Peoria, &c. R. R. Co. v. Champ, 75 Ill. 577; Chicago, &c. R. R. Co. v. Goss, 17 Wis. 428.

¹ Jeffersonville, &c. R. R. Co. v. Foster, 63 Ind. 342; Toledo, &c. R. R. Co. v. Thomas, 18 Ind. 215; Illinois Central R. R. Co. v. Goodwin, 30 Ill. 117; Ohio, &c. R. R. Co. v. Eaves, 42 Ill. 288; Flint, &c. R. R. Co. v. Lull, 28 Mich. 510; Fisher v. Farmers' Loan & Trust Co., 21 Wis. 73; Curry v. Chicago, &c. R. R. Co., 43 Wis. 665.

² Illinois Central R. R. Co. v. Finnigan, 21 Ill. 646; Finch v. Central R. R. Co., 42 Iowa, 304; Downing v. Chicago, &c. R. R. Co., 43 Iowa, 96.

³ Hance v. Cayuga, &c. R. R. Co., 26 N. Y. 428; Darling v. Boston, &c. R. R. Co., 121 Mass. 118; McDonnell v. Pittsfield, &c. R. R. Co., 115 Mass. 564; Munger v. Tonawanda R. R. Co., 4 N. Y. 349.

⁴ Chapin v. Sullivan R. R. Co., 39 N. H. 564; Indianapolis, &c. R. R. Co. v. McKinney, 24 Ind. 283; Springfield, &c. R. R. Co. v. Andrew, 67 Ill. 218.

⁵ Indianapolis, &c. R. R. Co. v. Oestel, 20 Ind. 231; Indianapolis, &c. R. R. Co. v. Crandall, 58 Ind. 365; Jeffersonville, &c. R. R. Co. v. Beatty, 36 Ind. 15; Pittsburgh, &c. R. R. Co. v. Bowyer, 45 Ind. 496; Flint, &c. R. R. Co. v. Lull, 28 Mich. 510; Blair v. Milwaukee, &c. R. R. Co., 20 Wis. 254; Swearingen v. Missouri, &c. R. R. Co., 64 Mo. 73; Morris v. St.

both sides of the track,¹ or where a fence would interfere with the business of an adjacent owner. Thus, where a fence would interfere with a hay-press and saw-mill on adjoining lands, it was held that the company was not bound to erect a fence.² Where there is a natural obstacle, as a high bluff, hedge, ditch, etc., which furnishes an as effectual security as a fence prescribed by statute, it is treated as a lawful fence.³ Where a railway company is required to fence its road, it is its duty to fence both sides of it;⁴ and while it cannot be required to fence its road where it crosses a highway merely,⁵ yet, even though there is no special provision of the statute to that effect, where it is required to keep its road "properly fenced," it is bound to construct suitable cattle-guards at all highway crossings, to

Louis, &c. R. R. Co., 58 Mo. 78; *Durand v. Chicago*, &c. R. R. Co., 26 Iowa, 559; *Comstock v. Des Moines Valley R. R. Co.*, 32 Iowa, 376; *Cole v. Chicago*, &c. R. R. Co., 38 Iowa, 311; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Toledo*, &c. R. R. Co. v. *Chapin*, 66 Ill. 504; *Indianapolis*, &c. R. R. Co. v. *Christy*, 43 Ind. 143; *Chicago*, &c. R. R. Co. v. *Campbell*, 47 Mich. 265; *Robertson v. Atlantic*, &c. R. R. Co., 64 Mo. 412; *Flattes v. Chicago*, &c. R. R. Co., 35 Iowa, 191; *Cleveland v. Chicago*, &c. R. R. Co., 35 Iowa, 220; *Kyser v. Kansas City*, &c. R. R. Co., 56 Iowa, 207; *Latty v. Burlington*, &c. R. R. Co., 38 Iowa, 250. But in Iowa, under a statute prohibiting the running of trains upon depot-grounds at a greater rate of speed than eight miles an hour, it is held that the company is liable for cattle killed there when the train is running at a higher rate of speed. *Monahan v. Keokuk*, &c. R. R. Co., 45 Iowa, 523. But this statute has no application outside the depot-grounds. The burden of showing that the train was running at a rate of speed greater than that fixed by statute is upon the plaintiff. *Plaster v. Illinois Central R. R. Co.*, 35 Iowa, 549. In Missouri a railway company is not liable for injuries to stock which escapes upon its track within the corporate limits of a city and near its depots, unless it is shown to be guilty of negligence. *Wallace v. St. Louis*, &c. R. R. Co., 74 Mo. 594. But this is only the rule where it is necessary to keep the road open in order to transact the business of the company. *Morris v. St. Louis*, &c.

R. R. Co., 58 Mo. 78; *Swearingen v. Missouri*, &c. R. R. Co., 64 Mo. 73; and this is the rule generally held. *Wabash*, &c. R. R. Co. v. *Forsbee*, 77 Ind. 158; *Pittsburgh*, &c. R. R. Co. v. *Laufman*, 78 Ind. 319; and it may be shown that after the accident the company built a fence at the point where the cattle got upon the track, for the purpose of showing that they regarded a fence as necessary at that point. *Toledo*, &c. R. R. Co. v. *Owen*, 43 Ind. 405.

¹ *Indiana*, &c. R. R. Co. v. *Leak*, 89 Ind. 596.

² *Ohio*, &c. R. Co. v. *Rowland*, 50 Ind. 349; 51 id. 285; *Pittsburgh*, &c. R. Co. v. *Bowyer*, 45 Ind. 496; *Indianapolis*, &c. R. Co. v. *Kinney*, 8 Ind. 402.

³ *Hilliard v. Chicago*, &c. R. R. Co., 37 Iowa, 442.

⁴ *Tredway v. Sioux City*, &c. R. R. Co., 43 Iowa, 527.

⁵ *Flint*, &c. R. R. Co. v. *Lull*, 28 Mich. 510; *Indianapolis*, &c. R. R. Co. v. *Parker*, 29 Ind. 471; *Saward v. Chicago*, &c. R. R. Co., 30 Iowa, 551, 33 id. 386; *Iba v. Hannibal*, &c. R. R. Co., 45 Mo. 469. It cannot be required to fence its track where it runs upon a street or highway. *Indianapolis*, &c. R. R. Co. v. *Warner*, 35 Ind. 515; but it is required to fence its road where it is laid across the terminus of a street, — *Toledo*, &c. R. R. Co. v. *Cary*, 37 Ind. 172, — or where it runs along the side of a highway. *Indianapolis*, &c. R. R. Co. v. *McKinney*, 24 Ind. 283; *Indianapolis*, &c. R. R. Co. v. *Guard*, 24 Ind. 222.

prevent cattle from escaping from the highway upon its track.¹ But in most of the States the statute expressly requires that cattle-guards shall be constructed at all highway and farm crossings, and a neglect on the part of the company to erect suitable cattle-guards and keep them in repair renders it liable for injuries to cattle escaping from a highway upon its track by reason of such defect;² and the question as to whether a cattle-guard is sufficient or not is for the jury,³ and evidence of experts is not necessary; but the size of the cattle-guard, the kind of timber of which it is built, and the distance apart at which the timbers are laid being shown, the jury is competent to speak of its fitness.⁴ The company is also bound to keep its cattle-guards in repair,⁵ and free from snow or ice, which is liable to accumulate upon them and impair their usefulness.⁶ It will not be advisable to give the statutory provisions in reference either to fences or cattle-guards in the different States, as they differ essentially, and are merely local in their application.

SEC. 420. Private Crossings: Gates, Bars, etc. — Farm-crossings are generally required to be made in most of the States, and in some of them cattle-guards are required to be put in at such crossings; and where this is required, the duty exists whether the land was obtained by purchase or condemnation.⁷ At all private crossings the company is bound to put in either gates or bars as a part of the fence which it is required to maintain.⁸ The crossing may be built either over or under the track,⁹ where the one will answer as well as

¹ *Evansville, &c. R. Co. v. Barber*, 74 Ind. 169; *Pittsburgh, &c. R. Co. v. Eby*, 55 Ind. 567; *New Albany, &c. R. Co. v. Pace*, 13 Ind. 411; *Indianapolis, &c. R. Co. v. Irish*, 26 Ind. 268.

² *Cleveland, &c. R. Co. v. Newbrander*, 40 Ohio St. 15; 11 Am. & Eng. R. Cas. 183; *White v. Utica, &c. R. Co.*, 15 Hun (N. Y.), 333; *Spinner v. N. Y. Central R. Co.*, 67 N. Y. 153; *Fawcett v. North Midland Ry. Co.*, 2 Eng. L. & Eq. 289. The duty devolves upon the company, and it cannot screen itself from liability upon the ground that the contractor neglected to carry out his contract to build necessary cattle-guards, etc. *Houston, &c. R. Co. v. Meador*, 50 Tex. 77.

³ *Swartout v. N. Y. Central R. Co.*, 7 Hun, 571; *Railroad Co. v. Newbrander*, 40 Ohio St. 15; *Chicago, &c. R. Co. v. Farrelly*, 3 Ill. App. 60.

⁴ *MULLIN, J.*, in *Swartout v. N. Y. Central R. Co.*, 7 Hun, 571.

⁵ *Hance v. Cayuga, &c. R. Co.*, 26 N. Y. 428; *Chicago, &c. R. Co. v. Reid*, 24 Ill. 144.

⁶ *Dunnigan v. Chicago, &c. R. Co.*, 18 Wis. 28.

⁷ *Clarke v. Rochester, &c. Co.*, 18 Barb. (N. Y.) 350.

⁸ *Hurd v. Rutland, &c. R. Co.*, 25 Vt. 116; *Pittsburgh, &c. R. Co. v. Cunningham*, 39 Ohio St. 327; 13 Am. & Eng. R. Cas. 529; *Indianapolis, &c. R. Co. v. Thomas*, 84 Ind. 194. *Compare Croy v. Louisville, &c. R. Co.*, 97 Ind. 126; 19 Am. & Eng. R. Cas. 608. The company is not liable for an injury caused by the negligent construction of a private crossing constructed and used by private parties. *Pratt Coal Co. v. Davis*, 79 Ala. 308.

⁹ *St. Paul, &c. R. Co. v. Murphy*, 19 Minn. 500; *Wheeler v. Rochester, &c. R. Co.*, 12 Barb. (N. Y.) 227.

the other. The crossing must be suitable and sufficient, and the question whether it is or not is one which depends upon the circumstances, and is for the jury.¹ Not only is the company bound to put in gates or bars for the convenience of the owner, but it is also bound to keep them in repair.² If they are left open by its agents or servants who pass through them with its assent, express or implied,³ or by third persons when it has failed to use proper diligence to close them,⁴ it is liable for injuries resulting to cattle escaping upon the track in consequence thereof, but not when they are left open by the land-owner or occupant, or his servants.⁵ Nor is the company liable either to the occupant or others when the land-owner or occupant erects gates or bars at points where the company is not bound to maintain them.⁶

SEC. 421. **Statutory Duty to Fence.** — It has previously been stated that the duty to fence a railway track is only created by statute. But in most of the States the statute imposes this duty, and the duty must be strictly performed, or the land-owner may compel performance by action⁷ or by *mandamus*,⁸ and it is also liable for all injuries to live stock resulting therefrom, which escape from the owner's land upon the track by reason of its omission to build the

¹ *Horne v. Atlantic, &c. R. Co.*, 36 N. H. 440; *Gray v. Burlington, &c. R. Co.*, 37 Iowa, 119; *Wheeler v. Rochester, &c. R. Co.*, 12 Barb. (N. Y.) 227.

² *Chicago, &c. R. R. Co. v. Harris*, 54 Ill. 528; *Illinois Central R. R. Co. v. Arnold*, 47 Ill. 173; *Waldron v. Portland, &c. R. R. Co.*, 35 Me. 422.

³ *Spinner v. N. Y. Central R. R. Co.*, 67 N. Y. 153; *Chapman v. N. Y. Central R. R. Co.*, 33 N. Y. 369.

⁴ *Russell v. Hanley*, 20 Iowa, 219; *Bartlett v. Dubuque, &c. R. R. Co.*, 20 Iowa, 188; *Illinois Central R. R. Co. v. McKee*, 43 Ill. 119; *Chicago, &c. R. R. Co. v. Magee*, 60 Ill. 529; *Illinois Central R. R. Co. v. Arnold*, 47 Ill. 173.

⁵ *Eames v. Boston, &c. R. R. Co.*, 14 Allen (Mass.), 151.

⁶ *Kountz v. Toledo, &c. R. R. Co.*, 54 Ind. 515; *Indianapolis, &c. R. R. Co. v. Skinner*, 17 Ind. 295; *Indianapolis, &c. R. R. Co. v. Adkins*, 23 Ind. 340.

⁷ *Jones v. Seligman*, 16 Hun (N. Y.), 280; *Wademan v. Albany, &c. R. R. Co.*, 51 N. Y. 588; *People v. Rochester, &c. R. R. Co.*, 76 N. Y. 294. In some of the

States it has been intimated, if not directly held, that the duty to fence exists independently of the statute, — *Quimby v. Vt. Central R. R. Co.*, 23 Vt. 387, — and in others it has been inferred from a statute which imposed a penalty for not building, — *Dean v. Sullivan R. R. Co.*, 22 N. H. 316; *Horne v. Atlantic, &c. R. R. Co.*, 35 N. H. 169, — and in others, a neglect to fence has been held sufficient to establish negligence. *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Kerwhacker v. Cleveland, &c. R. R. Co.*, 3 Ohio St. 172; *Cincinnati, &c. R. R. Co. v. Waterson*, 4 Ohio St. 474.

⁸ In *People v. Rochester, &c. R. R. Co.*, 14 Hun (N. Y.), 87, the court issued a writ of *mandamus* directing the defendant to fence its road as required by law. The defendant having failed to comply with the mandate of the writ, the court made an order requiring it to appear and show cause why it should not be punished as for a contempt. The company having failed to show a reasonable excuse, a fine of \$507.02 was imposed.

fence, without reference to the question of negligence.¹ It is incumbent, however, upon the plaintiff to show that the injury resulted

¹ *Sika v. Chicago, &c. R. R. Co.*, 21 Wis. 370; *McCall v. Chamberlain*, 13 Wis. 637; *Brown v. Milwaukee, &c. R. R. Co.*, 21 Wis. 39; *Bennett v. Chicago, &c. R. R. Co.*, 19 Wis. 145; *Blair v. Milwaukee, &c. R. R. Co.*, 20 Wis. 254; *Norris v. Androscoggin R. R. Co.*, 39 Me. 273; *Small v. Chicago, &c. R. R. Co.*, 50 Iowa, 341; *Smith v. Eastern R. R. Co.*, 35 N. H. 356; *Ohio, &c. R. R. Co. v. Clutter*, 82 Ill. 123; *Toledo, &c. R. R. Co. v. Lanery*, 71 Ill. 522; *Thayer v. St. Louis, &c. R. R. Co.*, 22 Ind. 26. Indeed, evidence of contributory negligence on the part of the owner is held to be not admissible. *Mead v. Burlington, &c. R. R. Co.*, 52 Vt. 268; *Lackin v. Del. & Hud. Canal Co.*, 22 Hun (N. Y.), 309. In this case interest on the value of the cattle killed was held to be recoverable. A person whose land does not border on the railway may recover when his cattle escape from his land upon that adjoining, and from a failure of the company to maintain a fence get upon the railway and are injured or killed. *Dunkirk, &c. R. R. Co. v. Mead*, 90 Penn. St. 454; *Gillam v. Sioux City, &c. R. R. Co.*, 26 Minn. 268. The fact that the owner of the land has fenced the road, the company having neglected to do so, it not being done under an agreement, the company is liable for animals killed, which escape upon its track through such fence. *Fontaine v. Southern Pacific R. R. Co.*, 54 Cal. 645. But this would not be so if the owner built the fence under a contract with the company. *St. Louis, &c. R. R. Co. v. Washburn*, 97 Ill. 253. It is not the place of killing which controls, but the place of entry. *Jeffersonville, &c. R. R. Co. v. Lyon*, 76 Ind. 107. A company failing to fence its road is liable for injuries to stock resulting from such neglect, even though inflicted while the road is being operated by a receiver. *Kansas Pacific R. R. Co. v. Wood*, 24 Kan. 619. See, holding the doctrine stated in the text, *Cary v. St. Louis, &c. R. R. Co.*, 60 Mo. 209; *Burton v. No. Missouri R. R. Co.*, 30 Mo. 372; *Noll v. St. Louis, &c. R. R. Co.*, 59 Mo. 112; *Powell v. St. Joseph*, 31 Mo. 347; *Miles v. Hannibal,*

&c. R. R. Co., 31 Mo. 407; *Toledo, &c. R. R. Co. v. Penn*, 68 Ill. 524; *Toledo, &c. R. R. Co. v. Logan*, 71 Ill. 191; *Rogers v. Newburyport R. R. Co.*, 1 Allen (Mass.), 16; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *McCoy v. California, &c. R. R. Co.*, 40 Cal. 532. In Wisconsin it is held that the contributory negligence of the plaintiff is a defence even though the company has not built or properly maintained its fence. *Curry v. Chicago, &c. R. R. Co.*, 43 Wis. 665; *Lawrence v. Milwaukee, &c. R. R. Co.*, 42 Wis. 322; *Jones v. Sheboygan, &c. R. R. Co.*, 42 Wis. 306. As where he, or his servants, leave gates or bars open in the fence. *Richardson v. Chicago, &c. R. R. Co.*, 56 Wis. 347; *Laude v. Chicago, &c. R. R. Co.*, 33 Wis. 640. In Ohio the company is bound only to ordinary care if the road is properly fenced. *Cleveland, &c. R. Co. v. Newbrander*, 40 Ohio St. 15; 11 Am. & Eng. R. Cas. 480. In New York, the mere negligence of the plaintiff is no defence. *Rhodes v. Utica, &c. R. R. Co.*, 5 Hun (N. Y.), 344; *Brady v. Rensselaer, &c. R. R. Co.*, 1 Hun (N. Y.), 378. In New Hampshire the company is not liable for damages to cattle which are unlawfully upon adjoining land and thence escape upon its track. *Giles v. Boston, &c. R. R. Co.*, 55 N. H. 552. Nor where it was in the exercise of ordinary care is it liable where cattle escape upon the track through the negligence of the plaintiff. *Hook v. Worcester, &c. R. R. Co.*, 58 N. H. 251. In Nebraska the company is liable, even though the cattle were running at large. *Tremont, &c. R. R. Co. v. Lamb*, 11 Neb. 522. In Missouri the statute dispenses with proof of negligence, and the company is not liable if a fence or gate is built as the owner wished it to be, even though it proved insufficient. *Harrington v. Chicago, &c. R. R. Co.*, 71 Mo. 384. It is also held that the company is only liable for injuries resulting from cattle being hit by its trains, and is not liable for their loss by drowning or falling into pits or wells on the right of way. *Hughes v. Hannibal, &c. R. R. Co.*, 66 Mo. 325. In Minnesota contributory negligence is a defence.

from the failure to build or properly maintain the fence.¹ And the company may exonerate itself from liability by showing that the cattle entered upon its track at a point where it was not required to erect a fence, and that the injury was not wilfully or wantonly inflicted,² or over a fence erected by it which fully answers the requirements of the statute. So, too, it may show that the land-owner has waived the building of a fence by it,³ as that he agreed to maintain the fence himself.⁴ If a land-owner, for a consideration, contracts to build and maintain the fence, it is held in some of the States that this exempts the company from liability to third persons not in privity with the land-owner; but the question whether it does or not depends entirely upon the policy of the statute, with a decided leaning to the doctrine that it does not.⁵ But such an agreement is

Whittier v. Chicago, &c. R. R. Co., 24 Minn. 394. So also in *Maine*. *Estes v. Atlantic, &c. R. R. Co.*, 63 Me. 308. The company is not bound to erect a fence to keep children off its tracks. *Fitzgerald v. St. Paul, &c. R. R. Co.*, 29 Minn. 336; 43 Am. Rep. 212; *Waulkenhauer v. Chicago, &c. R. R. Co.*, 17 Fed. Rep. 336.

¹ *Atchison, &c. R. R. Co. v. Yates*, 21 Kan. 613; *Waldron v. Rensselaer, &c. R. R. Co.*, 8 Barb. (N. Y.) 390; *Joliet, &c. R. R. Co. v. Jones*, 20 Ill. 221; *Kyser v. Kansas City, &c. R. R. Co.*, 56 Iowa, 207; *Chicago, &c. R. R. Co. v. Campbell*, 47 Mich. 265; *Peoria, &c. R. R. Co. v. Dugan*, 10 Ill. App. 238; *Grand Rapids, &c. R. R. Co. v. Monroe*, 47 Mich. 152. In Missouri it is held that the plaintiff should state in his declaration that the cattle got upon the track through the neglect of the company to build or maintain a fence. *Morrow v. Kansas, &c. R. R. Co.*, 74 Mo. 82; *Rowland v. St. Louis, &c. R. R. Co.*, 73 Mo. 619; *Sloan v. Missouri, &c. R. R. Co.*, 74 Mo. 47; *Bates v. St. Louis, &c. R. R. Co.*, 74 Mo. 60; *Edwards v. Kansas City, &c. R. R. Co.*, 74 Mo. 117. In Kentucky the statute makes the fact of killing *prima facie* evidence of negligence. *Kentucky Central R. R. Co. v. Talbot*, 78 Ky. 421.

² *Nashville, &c. R. R. Co. v. Comans*, 45 Ala. 437; *Indianapolis, &c. R. R. Co. v. Caldwell*, 9 Ind. 397; *Jeffersonville, &c. R. R. Co. v. Huber*, 42 Ind. 178; *Indiana Central R. R. Co. v. Gapen*, 10 Ind. 292;

Chicago, &c. R. R. Co. v. Farrelly, 3 Brad. (Ill.) 60. In Wisconsin the statute expressly exempts the company from building a fence "where the proximity of ponds, hills, embankments, or other sufficient protection renders a fence unnecessary to protect cattle from straying" upon the track; and the question as to whether such obstacles are a sufficient protection or not is a question of fact. If they would reasonably be expected to be generally sufficient, the insufficiency may be established by the circumstance that upon one occasion cattle had surmounted the obstacle. *Veerhusen v. Chicago, &c. R. R. Co.*, 53 Wis. 689.

³ *Cornwall v. Sullivan R. R. Co.*, 28 N. H. 161; *Hurd v. Rutland, &c. R. R. Co.*, 25 Vt. 116; *Tyson v. K., &c. R. R. Co.*, 43 Iowa, 207; *Enright v. San Francisco, &c. R. R. Co.*, 33 Cal. 230.

⁴ *Baltimore, &c. R. R. Co. v. Johnson*, 59 Ind. 188; *Cincinnati, &c. R. R. Co. v. Ridge*, 54 Ind. 39; *Tombs v. Rochester, &c. R. R. Co.*, 18 Barb. (N. Y.) 583; *Eames v. Worcester, &c. R. R. Co.*, 105 Mass. 193; *Cincinnati, &c. R. R. Co. v. Waterson*, 4 Ohio St. 424; *Pittsburgh, &c. R. R. Co. v. Smith*, 26 Ohio St. 124; *Terre Haute, &c. R. R. Co. v. Smith*, 16 Ind. 102; *Fort Wayne, &c. R. R. Co. v. Musseter*, 48 Ind. 286.

⁵ *Shepard v. Buffalo, &c. R. R. Co.*, 35 N. Y. 641; *Jeffersonville, &c. R. R. Co. v. Nichols*, 80 Ind. 321; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Warren v.*

binding upon the owner and his tenants,¹ and if in writing, and the intent to charge the land appears therein, it runs with the land and binds his grantees;² and such has also been held to be the rule where the agreement is recited in the record of the condemnation proceedings;³ but a mere parol agreement is only binding upon the parties thereto.⁴ Where a valid agreement exists, if the company is held liable to third persons for injuries to cattle escaping upon its track through the insufficiency of the fence, it has a remedy against the land-owner therefor.⁵ These statutes are not retrospective, and can only apply to injuries resulting after the statute takes effect;⁶ but they may be applied to companies previously incorporated.⁷ The company, having erected a fence of the kind required by statute, is only liable where negligence in maintaining it is shown, and if it falls into disrepair, it is entitled to notice of the defect, or circumstances should be shown which show that it ought to have known of the defect and repaired it;⁸ and the question is for the jury, unless

K., &c. R. R. Co., 41 Iowa, 484; Cincinnati, &c. R. R. Co. v. Ridge, *ante*; Gilman v. European, &c. R. R. Co., 60 Me. 98.

¹ Duffy v. N. Y. & Harlem R. R. Co., 2 Hilt. (N. Y. C. P.) 496; Indianapolis, &c. R. R. Co. v. Shriner, 17 Ind. 295.

² Bronson v. Coffin, 108 Mass. 175; Cook v. Milwaukee, &c. R. R. Co., 36 Wis. 45; Easter v. Little Miami R. R. Co., 14 Ohio St. 48; Gill v. Atlantic, &c. R. R. Co., 27 Ohio St. 240.

³ Huston v. Cincinnati, &c. R. R. Co., 21 Ohio St. 235.

⁴ Vandergrift v. Delaware R. R. Co., 2 Houst. (Del.) 287; Wilder v. Maine Central R. R. Co., 65 Me. 332; Morse v. Boston, &c. R. R. Co., 2 Cush. (Mass.) 536; St. Louis, &c. R. R. Co. v. Todd, 36 Ill. 409.

⁵ Warren v. K., &c. R. R. Co., 41 Iowa, 484.

⁶ Girtman v. Central R. Co., 1 Ga. 173.

⁷ Galena, &c. R. Co. v. Crawford, 25 Ill. 529; Boston, &c. R. Co. v. Briggs, 132 Mass. 24; *post*, § 495.

⁸ Hodge v. N. Y. Central, &c. R. R. Co., 27 Hun (N. Y.), 394; Clardy v. St. Louis, &c. R. R. Co., 73 Mo. 576. The company is only bound to exercise reasonable diligence in keeping its fences in repair. If the servants whose duty it

is to attend to such matters see or know of the defect, it is their duty to make the repairs within a reasonable time. Robinson v. Grand Trunk R. R. Co., 32 Mich. 322; Murray v. N. Y. Central R. R. Co., 3 Abb. App. Cas. (N. Y.) 339; Curry v. Chicago, &c. R. R. Co., 43 Wis. 665; Lemmon v. Chicago, &c. R. R. Co., 32 Iowa, 151; Lawrence v. Milwaukee, &c. R. R. Co., 42 Wis. 322; Toledo, &c. R. R. Co. v. Daniels, 21 Ind. 256; Pittsburgh, &c. R. R. Co. v. Eby, 55 Ind. 567; Indianapolis, &c. R. R. Co. v. Truitt, 24 Ind. 162; Toledo, &c. R. R. Co. v. Cohen, 44 Ind. 444; Case v. St. Louis, &c. R. R. Co., 75 Mo. 668; Aylesworth v. Chicago, &c. R. R. Co., 30 Iowa, 459; Chicago, &c. R. R. Co. v. Unpenouf, 69 Ill. 198; Toledo, &c. R. R. Co. v. Nelson, 77 Ill. 160; Illinois Central R. R. Co. v. Dickerson, 27 Ill. 55. The question as to what is a reasonable time in which to repair is generally one of fact for the jury. Indianapolis, &c. R. R. Co. v. Hall, 88 Ill. 368; Great Western R. R. Co. v. Helm, 27 Ill. 198; Munch v. N. Y. Central R. R. Co., 29 Barb. (N. Y.) 647; Toledo, &c. R. R. Co. v. Fowler, 22 Ind. 216; McDowell v. N. Y. Central R. R. Co., 37 Barb. (N. Y.) 195; Chicago, &c. R. R. Co. v. Saunders, 85 Ill. 288; Chicago, &c. R. R. Co. v. Barrie, 55 Ill. 266. The plaintiff must

the facts are such as to make it the duty of the court to hold that as a matter of law negligence cannot be imputed to the company. Thus, in a Wisconsin case, the defendant's fence between its track and the plaintiff's pasture was swept away by a flood, which was at its height about eight days before plaintiff's horses were injured on said track. During the three days immediately preceding the injury the water along the line of the fence had fallen at the rate of nearly eight inches each day, and at the time of the injury it had not subsided so as to leave the entire line of the fence at the place in question uncovered. The jury found that a new fence might have been properly and reasonably constructed two days before the injury. It was held that the court erred in submitting to them the question whether the defendant was negligent in neglecting to re-

show that the company knew of the defect, or circumstances which show that it ought to have known of it. *Perry v. Dubuque, &c. R. R. Co.*, 36 Iowa, 102; *Aylesworth v. Chicago, &c. R. R. Co.*, 30 Iowa, 459; *Toledo, &c. R. R. Co. v. Cohen*, 44 Ind. 444. If the plaintiff knew of the defect, he should notify the company. *Chicago, &c. R. R. Co. v. Seiner*, 60 Ill. 295; *Poler v. N. Y. Central, &c. R. R. Co.*, 16 N. Y. 476. While a railway company is bound to keep its fences in repair, yet, having built a sufficient fence, it has a right to presume that it will remain in repair for a reasonable time, and is not bound to keep constant watch over it; and the question whether it has kept a sufficient watch or not is for the jury. *Illinois Central R. R. Co. v. Dickerson*, 27 Ill. 55; *Illinois Central R. R. Co. v. McKee*, 43 Ill. 119. The Nebraska statutes provide thus: "Any railroad company hereafter running or operating its roads in this State, and failing to fence on both sides thereof against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engineers, or by the agents, employes, or engines belonging to any railroad company running over and upon such road, or there being." And thus: "No cattle, horses, mules, swine, or sheep shall run at large during the night-time, between sunset and sunrise, in the State of Nebraska, and the owner or owners of any such animal shall

be liable in an action for damages during such night-time." It was held that a railway company neglecting to fence its track will be liable for the killing of animals at large during the night-time. *Burlington, &c. R. Co. v. Brinckman*, 14 Neb. 70; 15 N. W. 197. But in the absence of a statute requiring it, a railroad company need not erect a guard around an excavation on its own land within city limits, away from the highway, to prevent animals at large from falling into such excavation. If an excavation was made so near a public road that persons or animals passing along the road might accidentally fall into the same, it would be the duty of the party making the excavation to erect suitable guards to prevent such accidents, and upon failure to do so the party injured could recover whatever damages he might have sustained from the neglect. *Cooley Torts*, 660; *Beck v. Carter*, 68 N. Y. 283; *Baltimore, &c. R. R. Co. v. Boteler*, 38 Md. 568; *Davis v. Hill*, 41 N. H. 329; *Vale v. Bliss*, 50 Barb. (N. Y.) 358; *Hardcastle v. Railroad Co.*, 4 H. & N. 67; *Barnes v. Ward, C. & K.* 661. But where a party makes an excavation on his own land away from a public thoroughfare, there is no case in which it is held that such party must erect guards around the same for the protection of persons or stock trespassing on said land. There is no obligation in such case. *Clary v. Burlington, &c. R. Co.*, 14 Neb. 232; 15 N. W. Rep. 220.

build the fence.¹ If the fence is built according to the requirements of the statute, as to height, strength, etc., the question of its suitability or sufficiency is not open to inquiry.² But where the statute does not specify the kind of fence to be built, the company may build such a fence as is usually built in that locality, and is regarded as sufficient to keep cattle out, or any fence which is sufficient for that purpose, and which is not injurious to adjoining proprietors.³ In New York it has been held that a fence such as is usually or customarily built between adjoining proprietors is sufficient;⁴ but any other fence which is sufficient will answer the requirements of the law.⁵ But if the company builds a fence of such materials or in such a way that cattle running against it will necessarily be injured, it is liable for such injuries, as for injuries to a horse which is driven by it upon a barbed wire fence with which its track is enclosed.⁶

¹ *Goddard v. Chicago, &c. R. R. Co.*, 54 Wis. 548; *Toledo, &c. R. R. Co. v. Eder*, 45 Mich. 329; *Hilliard v. Chicago, &c. R. R. Co.*, 37 Iowa, 442; *Davis v. Chicago, &c. R. R. Co.*, 43 Iowa, 96; *McCormick v. Chicago, &c. R. R. Co.*, 41 Iowa, 193; *Downing v. Chicago, &c. R. R. Co.*, 43 Iowa, 96. In *Stephenson v. Grand Trunk R. R. Co.*, 34 Mich. 323, a suit against a railway company for want of reasonable diligence in repairing a fence destroyed by fire, it was held not error to exclude evidence that the repairs might have been more quickly made of suitable materials which were near at hand, but which, it is conceded, did not belong to the company, and which were not shown to have been available to it for that purpose. Thus a railway fence being discovered on fire about six or seven o'clock in the evening, and the section foreman getting notice thereof at about eight o'clock that evening, having proceeded the next morning before six o'clock to repair the same as soon as practicable from the nearest materials belonging to the company, which were about half a mile distant, it was held the company was not guilty of any unreasonable delay in making the repairs.

² *Enright v. San Francisco, &c. R. R. Co.*, 33 Cal. 230; *Swartout v. N. Y. Cent. R. R. Co.*, 7 Hun (N. Y.), 571.

³ *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397; *Eames v. Salem, &c. R. R. Co.*, 98 Mass. 560; *Toledo, &c. R. R. Co.*

v. Thomas, 18 Ind. 215; *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Bronson v. Coffin*, 108 Mass. 175; *Enright v. San Francisco, &c. R. R. Co.*, 33 Cal. 230.

⁴ *Ferris v. Van Buskirk, ante.*

⁵ *Bronson v. Coffin*, 108 Mass. 175; *Eames v. Salem, &c. R. R. Co.*, 98 Mass. 560.

⁶ *Atlanta, &c. R. R. Co. v. Hudson*, 62 Ga. 679. The Minnesota statute imposes upon all railroad companies the duty to build good and sufficient fences on each side of their roads, and provides that "all railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies; and a failure to build and maintain fences as above provided shall be deemed an act of negligence on the part of the companies." The plaintiff's mule escaped and ran upon defendant's unfenced railroad track, and while running and jumping along the railroad track, it got its foot into a small hole in the soil, between the ties, and in some unexplained way broke its leg. The hole was a small one, "about the size of a mule's foot," and from two to four inches in size "each way." There was no train along the track at the time of the injury. It was held that the injury was not one reasonably to be apprehended, and did not follow as a natural or ordinary sequence of the absence of a fence, and that the railroad company were not liable for the killing of the animal. See *Holden v. Rutland, &c. R. R.*

Hedges, if sufficient to keep cattle off the track, constitute a suitable fence; but if cattle do escape through it upon the track and are injured, the company is liable. It takes the risk of its sufficiency.¹ A railway company is held in Kansas not to be required to build a hog-tight fence,² and in the absence of any special provision in the statute relative thereto, it is only required to build such fences as are usually built for division fences, and is not required to consult the necessities or requirements of the land-owner. If the land-owner, for his own purposes, changes the location or character of the fence, he assumes all responsibility for the consequences of such act;³ and the same rule has been adopted where he voluntarily repairs the fence.⁴ Willow hedges are not permissible as a fence, because they are injurious to the adjoining land, and the courts will enjoin the company from setting them, upon a bill brought by the land-owner; and the same would doubtless be true of any species of hedge which injures the land either by shading it or by exhausting the soil.⁵ A hedge, ditch, ledge, or other natural obstacle, may be a sufficient fence, if it is sufficient to keep cattle from entering upon the track at that point, as the company is not bound to fence so that cattle cannot get off from its tracks, but only to prevent them from getting upon them.⁶ When laid over public lands⁷ or in the bed of a navigable river,⁸ the company is not bound to fence; but when laid upon an embankment in the bed of a canal, or upon a tow-path of a canal which has been abandoned, it is held that it *is* required to fence its track.⁹ The question whether a river is a sufficient barrier to dispense with a fence upon one side of the track is one of fact, to be determined by the size and character of the stream.

It would be impossible, as well as impracticable, in this work to enter into details either as to the special provisions of the statutes in the different States relative to the duties of railway companies to

Co., 30 Vt. 297. The cases *Salisbury v. Herchenroder*, 106 Mass. 99; *Seimers v. Eisem*, 54 Cal. 418; *Powell v. Salisbury*, 2 Y. & J. 391, distinguished. *Nelson v. Chicago, &c. R. R. Co.*, 30 Minn. 74.

¹ *Bessant v. Great Western R. R. Co.*, 8 C. B. N. s. 368.

² *Atchison, &c. R. R. Co. v. Yates*, 21 Kan. 618.

³ *Kountz v. Toledo, &c. R. R. Co.*, 54 Ind. 515.

⁴ *Chicago, &c. R. R. Co. v. Seiver*, 60 Ill. 295.

⁵ *Brock v. Conn. & Pass. River R. R. Co.*, 35 Vt. 373.

⁶ *Hilliard v. Chicago, &c. R. R. Co.*, 37 Iowa, 442. An embankment upon which a track is laid should be fenced unless sufficient to keep cattle out. *Shepard v. Buffalo, &c. R. R. Co.*, 35 N. Y. 641.

⁷ *Walsh v. Virginia, &c. R. R. Co.*, 8 Nev. 110.

⁸ *Schermerhorn v. Hudson River R. R. Co.*, 38 N. Y. 103.

⁹ *White River Valley R. R. Co. v. Quick*, 30 Ind. 127.

fence their roads, or their liability for a failure to do so, as these statutes are quite diverse in their provisions and purely local in their application. In some of them the company is made liable if it fails to build or maintain a fence, irrespective of the question of negligence on the part of either party, while in others liability depends entirely upon the question of negligence. In some of them fences are not required to be built in cities, etc., while in others fences must be built except where the convenience of the public will be incommoded thereby. Some of these statutes are sensible and just, while others are the opposite, and evince a prejudice against these corporations which is wholly unwarranted, and impose burdens upon them which ought not to be imposed. Indeed, some of them evince a higher care and consideration for the preservation of the lives of animals than is evinced for the lives of human beings, and impose upon these companies a higher degree of care in reference to animals than is required in the case of human trespassers upon their tracks; and it is a lamentable fact that in some instances the courts evince a disposition not merely to carry out, but to extend, these statutes beyond any limits ever contemplated by the legislature.

SEC. 422. **Evidence: Burden of Proof.**—Except* in those cases where the statute makes the mere fact of killing *prima facie* evidence of negligence on the part of the company, the burden of establishing such negligence is upon the plaintiff.¹ But when the cattle

¹ New Orleans, &c. R. R. Co. v. Enoch, 42 Miss. 603; Terry v. N. Y. Central R. R. Co., 22 Barb. (N. Y.) 574; Indianapolis, &c. R. R. Co. v. Caudle, 60 Ind. 112; Indianapolis, &c. R. R. Co. v. Means, 14 Ind. 30; Cincinnati, &c. R. R. Co. v. Bartlett, 58 Ind. 572; Grand Rapids, &c. R. R. Co. v. Judson, 34 Mich. 506; Lyndsay v. Conn. & Pass. River R. R. Co., 27 Vt. 648; Chicago, &c. R. R. Co. v. Farrelly, 3 Brad. (Ill.) 60; Ill. Central R. R. Co. v. Reedy, 17 Ill. 580; Peoria, &c. R. R. Co. v. Barton, 80 Ill. 72; Illinois Central R. R. Co. v. Whalen, 42 Ill. 396; Rockford, &c. R. R. Co. v. Connell, 67 Ill. 216; Lawrence v. Milwaukee, &c. R. R. Co., 42 Wis. 322; Plaster v. Ill. Central R. R. Co., 35 Iowa, 449; Schneir v. Chicago, &c. R. R. Co., 40 Iowa, 337; Lawrence v. Milwaukee, &c. R. R. Co., 42 Wis. 322; Waldron v. Portland, &c. R. R. Co., 35 Me. 422; Bethje v. Houston, &c. R. R. Co. 26 Tex. 604; Grand Rapids, &c. R. R.

Co. v. Judson, 34 Mich. 506; Locke v. St. Paul, &c. R. R. Co., 15 Minn. 350; Walsh v. Virginia, &c. R. R. Co., 8 Nev. 110; Daggett v. Richmond, &c. R. R. Co., 81 N. C. 457; Scott v. Wilmington, &c. R. R. Co., 4 Jones (N. C.), 432. But in some of the States the mere fact of injury is held to operate as *prima facie* evidence of negligence, — Smith v. Eastern R. R. Co., 35 N. H. 356; White v. Concord R. R. Co., 30 N. H. 188; Danner v. So. Carolina R. R. Co., 4 Rich. (S. C.) 329; Roof v. Charlotte, &c. R. R. Co., 4 S. C. 61; Wilson v. Wilmington, &c. R. R. Co., 10 Rich. (S. C.) 52; Woolfolk v. Macon, &c. R. R. Co., 56 Ga. 457, — and in others it is made so by statute. Little Rock, &c. R. R. Co. v. Payne, 33 Ark. 816; Little Rock, &c. R. R. Co. v. Henson, 39 Ark. 413; Little Rock, &c. R. R. Co. v. Finley, 37 Ark., 562; Memphis, &c. R. R. Co. v. Jones, 36 Ark. 87; St. Louis, &c. R. R. Co. v. Vincent, 36 Ark. 451; Western,

are injured or killed at a place where the company has failed to fence, or to maintain a sufficient fence, the jury are justified in presuming that they entered upon the track at that place;¹ and the same is also the rule where the fence along the plaintiff's land is generally insecure and insufficient.² So, too, the plaintiff is required to show that the cattle entered upon the track at a point where the company was required to fence.³ The question as to whether it is

&c. R. Co. v. Steadly, 65 Ga. 263; South, &c. R. Co. v. Williams, 65 Ala. 74; Clements v. East Tenn., &c. R. Co., 77 Ala. 533 (onus on the company to prove a compliance with the statutory requirements); Alabama, &c. R. Co. v. McAlpine, 80 Ala. 73; Georgia R. Co. v. Fisk, 65 Ga. 714; Atlantic, &c. R. Co. v. Griffin, 61 Ga. 11; Columbus, &c. R. Co. v. Kennedy, 78 Ga. 646; 31 Am. & Eng. R. Cas. 92; Union Pac. R. Co. v. Dyche, 28 Kan. 200; Louisville, &c. R. Co. v. Brown, 13 Bush (Ky.), 475; Western Md. R. Co. v. Carter, 59 Md. 306; Keech v. Baltimore, &c. R. Co., 17 Md. 32; Chicago, &c. R. Co. v. Trotter, 60 Miss. 442; Louisville, &c. R. Co. v. Smith, 67 Miss. 15; Wilson v. Norfolk, &c. R. Co., 90 N. C. 69; 19 Am. & Eng. R. Cas. 453; Memphis, &c. R. Co. v. Smith, 9 Heisk. (Tenn.) 860. But it may be rebutted by proof of due care. Mobile, &c. R. Co. v. Williams, 53 Ala. 595; Little Rock, &c. R. Co. v. Payne, 33 Ark. 816. The uncontradicted testimony of defendant's witnesses that the injury was unavoidable sufficiently rebuts the statutory presumption. Memphis, &c. R. Co. v. Shoecraft, 53 Ark. 96; Alabama, &c. R. Co. v. Roebuck, 76 Ala. 277. See also Little Rock, &c. R. Co. v. Bashan, 47 Ark. 321; St. Louis, &c. R. Co. v. Hendricks, 53 Ark. 201. In St. Louis, &c. R. Co. v. Hagan, 42 Ark. 122; 19 Am. & Eng. R. Cas. 446, it is held that no presumption against the company arises from the mere fact that cattle are found wounded near the track; but when it is proved that the wounding was done by one of the company's trains, a presumption arises that the company's negligence was the cause. A statute providing for such a presumption does not apply, however, where the horses when killed were hitched to a vehicle and were under the control of a driver. Anna-

polis, &c. R. Co. v. Pumphrey, 72 Md. 82. *Contra* Randall v. Richmond, &c. R. Co., 104 N. C. 410, *affirmed*, 107 N. C. 748. But properly there should be no presumption of the company's negligence arising from the mere fact of the injury; the burden should rest upon the plaintiff to prove the liability of the company by a fair preponderance of the evidence. See *ante*, § 325 a; Cleveland, &c. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. Rep. 633; Atchison, &c. R. Co. v. Betts, 10 Col. 431; 31 Am. & Eng. R. Cas. 563; Burlington, &c. R. Co. v. Wendt, 12 Neb. 76; Savannah, &c. R. Co. v. Geiger, 21 Fla. 669; 29 Am. & Eng. R. Cas. 274; McKissock v. St. Louis, &c. R. Co., 73 Mo. 456; Lyndsay v. Connecticut, &c. R. Co., 27 Vt. 643; Fort Worth, &c. R. Co. v. Tomlinson (Tex.), 16 S. W. Rep. 866.

¹ Cecil v. Pacific R. Co., 47 Mo. 446; Walther v. Pacific R. Co., 55 Mo. 271; Fickle v. St. Louis, &c. R. Co., 54 Mo. 219; Lunts v. Chicago, &c. R. Co., 54 Mo. 228; St. Louis, &c. R. Co. v. Casner, 72 Ill. 384; Toledo, &c. R. Co. v. Pence, 68 Ill. 524; Galena, &c. R. Co. v. Crawford, 25 Ill. 529; Rockford, &c. R. Co. v. Lynch, 67 Ill. 149; Chicago, &c. R. Co. v. Utley, 38 Ill. 410; Chicago, &c. R. Co. v. Barrie, 55 Ill. 226; Small v. Chicago, &c. R. Co., 50 Iowa, 338; McCoy v. California Pacific R. Co., 40 Cal. 532; Bennett v. Milwaukee, &c. R. Co., 19 Wis. 145; Indianapolis, &c. R. Co. v. Means, 14 Ind. 30; Bellefontaine, &c. R. Co. v. Suman, 29 Ind. 40.

² Louisville, &c. R. Co. v. Spain, 61 Ind. 460.

³ Lawrence v. Milwaukee, &c. R. Co., 42 Wis. 322; Morrison v. N. Y. & New Haven R. Co., 32 Barb. (N. Y.) 568.

required to fence at a given point is generally a question of law.¹ Liability does not attach from the mere act of killing; and where the testimony fails to explain the circumstances of the killing or injury, the plaintiff cannot recover.² The fact of killing, as well as of the negligence, may be shown by circumstantial evidence.

In such actions, although there is no direct evidence of the killing, the jury must pass on the sufficiency of the circumstantial evidence adduced; and a general charge on the evidence against the plaintiff's right to recover is properly refused.³ It is not necessary that it should be shown by direct evidence that the animals were killed by the company's cars. It is sufficient if there are circumstances shown from which that fact may be fairly and justly inferred.⁴ But where the question is one purely of fact, if there is a

¹ Ill. Central R. Co. v. Whalen, 42 Ill. 396.

² Mobile, &c. R. Co. v. Hudson, 50 Miss. 572. See also Chicago, &c. R. Co. v. Trotter, 60 Miss. 442. In a case before the Kansas Court, which was an action brought by the owner of a colt, the testimony showed that the colt was seen alive on the morning of October 8, 1877, at a place where it usually ran, two or three hundred feet from the track, which was unfenced; that at 11 A. M. of said day a train passed east over the road; that on October 9, 1877, the colt was found dead and buried fifteen or twenty feet from the track; that at this time hair could be seen on the ends of the ties for about two rods, which corresponded with the color of the hair on the colt; and that from the marks along the ends of the ties and between the iron rails it looked as if an animal had been dragged along the road in an easterly direction. No evidence was introduced to contradict this testimony or explain these circumstances. It was held that after a verdict in favor of the plaintiff, and the district court has approved the verdict, the supreme court will not reverse the judgment. Central Branch R. Co. v. Pate, 21 Kan. 529.

³ South & North Alabama R. Co. v. Small, 70 Ala. 499.

⁴ Indianapolis, &c. R. Co. v. Thomas, 84 Ind. 194. Thus, where an animal is seen alive during an afternoon in the vicinity of a railroad, and the next morn-

ing the tracks of the animal are traced on an open bridge, and along that bridge, for the space of twenty feet, appear blood and bunches of hair, of color corresponding with that of the animal, and the animal, showing marks of violence, is found dead some time thereafter in the water below the bridge, and a witness testifies that, during the night after the animal was last seen alive, he heard a train whistle as it approached the bridge, and then heard something fall into the water and swimming therein, it was held that a verdict that the animal was killed by the train will not be set aside as against the evidence. Union Pacific R. Co. v. Harris, 28 Kan. 206; Blewett v. Wyandotte, &c. R. Co., 72 Mo. 583; Brockert v. Central Iowa R. Co., 82 Iowa, 370. But plaintiff is not entitled to a verdict where the only evidence is that the animal was found within fifty feet of the track with its legs skinned and bruised; there being no proof of how long it had lived after being injured, or how the injuries were occasioned. Missouri Pac. R. Co. v. Earle (Tex.), 14 S. W. Rep. 1068. Proof that the plaintiff's cow was seen near the defendant's track, with one of its legs broken, about the time that two trains had passed over the road, is some evidence in support of the plaintiff's claim for damages. Boing v. Raleigh, &c. R. Co., 87 N. C. 360; Jackson v. St. Louis, &c. R. Co., 36 Mo. App. 170; Morrow v. Hannibal, &c. R. Co., 29 Mo. App. 432.

total failure of proof to sustain the verdict of the jury, the court will set aside the judgment and remand the cause for a new trial. Thus, where a cow was injured, and it *might* have been injured by a train, but there was no evidence of the fact, it was held that the verdict founded solely on such evidence should be set aside.¹

The statements of the engine-driver in charge of the engine which killed the cattle, made an hour after the accident, and several hundred yards from where it occurred, though made while he was on the engine, which was off the track, having been thrown from the track as one of the results of the accident, are not competent evidence for the plaintiff in a suit against the company to prove negligence in the company, as they are no part of the *res gestæ*.² In a Kansas case, a witness was permitted to testify that he "looked about and saw hair on the ties; the first tie had a lot of hair on it, and the second one not so much, and so on," as indicating that the injured cow had been pushed along the railroad track by the company's engine; and it was held competent proof.³ But in an action to recover for injury to stock, alleged to have been caused by its being struck by a railway train, where there is no direct evidence of a collision, nor of traces of one along the track, evidence to show that such traces are always found when stock is struck by a passing train is not admissible.⁴ If the plaintiff, without introducing an eye-witness of the killing, proves marks along the track where the animal was dragged by the engine, the jury may disbelieve the engineer and fireman who testify that its leg was broken in a water-gap.⁵ In an action against a railway company for killing a cow, there was evidence to show that the cow was found beside the defendant's track, torn and mutilated, and that there was blood and cow's hair on the track near by. It was held sufficient to warrant the court in submitting to the jury the question how the animal came to her death.⁶

¹ Atchison, &c. R. Co. v. Seeley, 24 Kan. 265.

² Hawker v. Baltimore & Ohio R. Co., 15 W. Va. 628.

³ Central Branch Union Pacific R. Co. v. Butman, 22 Kan. 639.

⁴ Clark v. Kansas City, &c. R. Co., 55 Iowa, 455.

⁵ New Orleans, &c. R. Co. v. Toulme, 59 Miss. 284. On the question as to whether the engineer could, by the exercise of ordinary care, have seen the animal

in time to prevent the injury, a witness may state his opinion from an examination of the tracks, as to whether the animal walked or ran upon the track, without stating the appearance of the tracks. Chicago, &c. R. Co. v. Legg, 32 Ill. App. 218.

⁶ Blewett v. Wyandotte, &c. R. Co., 72 Mo. 588. In an action to recover for the killing of a horse, a witness testified that on the day of the accident he saw a freight train sixteen or eighteen miles from the trestle where the horse was killed and

A judgment for the plaintiff, in an action for damage to cattle, cannot stand without proof that the plaintiff was the owner of the cattle.¹ But proof of possession of the stock killed is *prima facie* evidence of ownership.² Where there is evidence that at the time of the killing, the defendant owned and operated the railway upon which the stock was killed, the court trying the cause might properly infer therefrom, in the absence of evidence to the contrary, that the train which struck and killed the stock was the property of the defendant.³ Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road. In an action to recover damages for injuries to live stock, inflicted by a train run on defendant's road, the plaintiff is not required to prove affirmatively that the train was controlled by defendant; in the absence of any evidence to the contrary, the jury is authorized to find the train was so run.⁴ It is proper for the plaintiff to inquire of competent witnesses whether the fence was such as good husbandmen usually kept.⁵ The allegation that the track was not fenced must be proved on the trial.⁶ Where the evidence shows that the stock killed had entered upon the track over a line of fence that was generally insecure, it is not necessary that it also show that the particular part thereof over which the stock passed was insecure.⁷ But the mere opinion of a witness upon the question whether a certain bank between defendant's track and land occupied by the plaintiff was "as good a protection against cattle as a fence four and a half feet high" is not admissible.⁸ Where the fences have been accidentally destroyed by fire, after the track-inspector has made his daily inspection, and the fact is not known until after the injury has been done, the company is not guilty of negligence.⁹

that there was fresh blood and hair on the cowcatcher, — held not too remote when it appeared that the train was the same one seen by other witnesses at the trestle. *International, &c. R. Co. v. Hughes* (Tex.), 16 S. W. Rep. 909.

¹ *Turner v. St. Louis, &c. R. Co.*, 76 Mo. 261; *Welsh v. Chicago, &c. R. Co.*, 53 Iowa, 632.

² *Toledo, &c. R. Co. v. Stevens*, 63 Ind. 337.

³ *Evansville, &c. R. Co. v. Smith*, 65 Ind. 92. Proof that the animal was attracted to the road-bed by salt sprinkled on the rails, does not establish negligence,

even *prima facie*, where it appears that the salt was used as a solvent to free the tracks of ice and snow. *Louisville, &c. R. Co. v. Phillips* (Miss.), 12 So. Rep. 825.

⁴ *South & North Ala. R. Co. v. Pilgreen*, 62 Ala. 305.

⁵ *Louisville, &c. R. Co. v. Spain*, 61 Ind. 460.

⁶ *Pittsburgh, &c. R. Co. v. Hackney*, 53 Ind. 488.

⁷ *Louisville, &c. R. Co. v. Spain*, 61 Ind. 460.

⁸ *Veerhusen v. Chicago, &c. R. Co.*, 53 Wis. 689.

⁹ *Toledo, &c. R. Co. v. Eder*, 45 Mich. 329.

SEC. 423. **Damages.** — The amount of the recovery is limited to the actual value of the animals killed, less the value of the carcass if used, the value of the hide, etc., after deducting the expenses of dressing, etc.¹ If the carcass was fit for use, its value must be deducted, although the owner gave it away.² But if there is no evidence that the animal was worth anything after it was killed, its full value may be given.³ In an action for killing a cow the plaintiff is entitled to recover its actual market value, and the jury may consider all its qualities which affect its market value, and are not limited to its value for beef or milking purposes.⁴ If the animal is injured simply, the difference between its value before and after the injury, and the reasonable expenses of its care, etc., and the temporary loss of its use, is the measure of recovery,⁵ and interest from the date of the injury.⁶ Exemplary damages are not recoverable unless the injury was wilfully inflicted.⁷ In some of the States, in order to secure the construction and proper maintenance of fences along their line by railway companies, statutes have been enacted imposing double damages for stock killed on the road, when it fails to maintain good and sufficient fences upon both sides of its track; and although the constitutionality of these statutes has been questioned, yet they are generally sustained.⁸

¹ *Case v. St. Louis, &c. R. Co.*, 75 Mo. 668; *Dean v. Chicago, &c. R. Co.*, 43 Wis. 305. But if the animal is badly bruised, etc., the owner is not bound to use any special diligence to dispose of the carcass, but may recover its full value. *Rockford, &c. R. Co. v. Lynch*, 67 Ill. 149; *Davidson v. Michigan Central R. Co.*, 49 Mich. 428.

² *Case v. St. Louis, &c. R. Co.*, 75 Mo. 668; *Georgia Pacific R. Co. v. Fullerton*, 79 Ala. 298.

³ *Atchison, &c. R. Co. v. Ireland*, 19 Kan. 405.

⁴ *Central Branch Union Pacific R. Co. v. Nichols*, 24 Kan. 242.

⁵ *Jackson v. St. Louis, &c. R. Co.*, 74 Mo. 526; *Atlanta, &c. R. Co. v. Hudson*, 62 Ga. 679; *Manwell v. Burlington, &c. R. Co.*, 80 Iowa, 663 (this rule applies under the Iowa statute concerning double damages). Where plaintiff introduces no evidence as to the value of the animal, a judgment in his favor for more than nominal damages must be set aside. *St. Louis, &c. R. Co. v. Pickens (Tex.)*, 14 S. W. Rep. 1071. In an action for damages

for the killing of a thoroughbred bull, a witness who knew the animal, his breed, and his peculiar merits may testify to its value, although he may not be an expert, and although his opinion is not based upon actual sales at or near the locality. *Alabama, &c. R. Co. v. Moody*, 92 Ala. 279. See also *Cantlin v. Hannibal, &c. R. Co.*, 54 Mo. 385; 14 Am. Rep. 476.

⁶ *Georgia Pacific R. Co. v. Fullerton*, 79 Ala. 298; *Larkin v. Del. & Hud. Canal Co.*, 22 Hun (N. Y.), 389; *Toledo, &c. R. Co. v. Johnson*, 74 Ill. 83; *Meyer v. Atlantic, &c. R. Co.*, 64 Mo. 542; *Houston, &c. R. Co. v. Muldrow*, 54 Tex. 233.

⁷ *Chicago, &c. R. Co. v. Janett*, 59 Miss. 470.

⁸ *Cairo & St. Louis, R. Co. v. People*, 92 Ill. 97; 34 Am Rep. 112; *Cummings v. St. Louis, &c. R. Co.*, 70 Mo. 570; *Kinion v. Kansas City, &c. R. Co.*, 39 Mo. App. 52; *Wood v. Kansas City, &c. R. Co.*, 39 Mo. App. 63; *Young v. Kansas City, &c. R. Co.*, 39 Mo. App. 52; *Donovan v. Hannibal, &c. R. Co.*, 89 Mo. 147; *Mackie v. Central R. Co.*, 54 Iowa, 546; *Cairo & St. Louis R. Co. v. Warring-*

In Nebraska,¹ however, such an act has been held to be unconstitutional, mainly upon the ground that the State constitution provides that "all fines and penalties" shall be appropriated for the use of common schools." In other States, it is provided by statute that in addition to compensatory damages, plaintiff may recover a reasonable amount as attorney's fees. Under such statutes it seems that it is for the jury to say what is a reasonable fee under the circumstances, and this may be greater or less than the amount actually paid by plaintiff to his attorney.²

ton, 92 Ill. 157; *Kaes v. Missouri Pacific R. Co.*, 6 Mo. App. 397. See also *Morrison v. Burlington, &c. R. Co.* (Iowa), 51 N. W. Rep. 75; *Broekert v. Central Iowa R. Co.*, 82 Iowa, 279. But a statute providing that the value of stock killed by a railroad which fails to fence its tracks shall be assessed by appraisers, and the amount thereupon become due and payable is unconstitutional in that it denies the right of trial by jury. *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. St. 195, 525.

¹ *Atchison, &c. R. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356.

² *Lake Erie, &c. R. Co. v. Helmericks*, 38 Ill. App. 141. It is not necessary that plaintiff should show in his pleadings that the employment of an attorney was necessary. A full statement of the facts, and a prayer for an attorney's fee, will sustain such a recovery, *Kansas City, &c. R. Co. v. Burge*, 40 Kan. 736; *Railway Co. v. Abney*, 30 Kan. 41; 1 Pac. Rep. 385.

CHAPTER XXVIII.

CARRIERS OF THINGS.

- SEC. 424. Railway Companies are Common Carriers : Liabilities of, etc.
425. Limitation of Liability by Contract.
426. Duty to receive Goods.
427. Delivery to the Company.
428. Right to demand Advance Freight.
429. Duty to Carry Safely.
430. Proper Carriages to be Provided.
431. Goods Injurious to Each Other not to be Stowed Together.
432. The Directions of the Owner must be Obeyed.
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434. Termination of the Transit.
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- SEC. 440. Rival Claimants.
441. Common Carrier's Liability only Determined by a Delivery.
442. Care which must be used in Delivery of the Goods.
443. When Carrier's Responsibility ceases, Question for Jury.
444. Delivering within Reasonable Time.
445. Mis-delivery, Effect of.
446. Delivery to right person.
447. What constitutes a delivery.
448. Delivery must be made within reasonable time.
449. Evidence of non-delivery.
450. Loss by Fire.
451. Misconduct of a third Person.
452. Fraud by the Customer.
- 452*a*. Liability where there are connecting Lines.
- 452*b*. Carriage of Live Stock.
- 455*c*. Freight awaiting Delivery : Notice to Consignee.
453. Who may sue for Loss or Injury.
454. Damages recoverable.

SEC. 424. **Railway Companies are Common Carriers : Liabilities of, etc.** — Independently of any statute, railway companies are common carriers of goods ; and this liability arises under the common law and the general custom of the country.¹ A common carrier is one who plies between certain termini, and openly professes to carry goods for hire for all such persons as may choose to employ him.²

¹ *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749 ; *Richards v. London, &c. Ry. Co.*, 7 C. B. 839 ; *Cranch v. London, &c. Ry. Co.*, 14 C. B. 255 ; *Armentrout v. St. Louis, &c. R. Co.*, 1 Mo. App. 158 ; *Houston, &c. R. Co. v. Ham*, 44 Tex. 628 ; *Hubbard v. Harnden Express Co.*, 10 R. I. 244 ; *Nashville, &c. R. Co. v. David*, 6 Heisk. (Tenn.) 261 ; *Mobile, &c. R. Co. v. Weiner*, 49 Miss. 725 ; *Mobile, &c. R. Co. v. Williams*, 54 Ala. 168 ; *Finn v. Western R. Co.*, 112 Mass. 524 ; *Ohio, &c. R. Co. v. Yohe*, 51 Ind. 181.

² *Russell v. Livingstone*, 19 Barb. (N.

But they may profess to carry only certain kinds of goods, and are liable as common carriers only according to such profession or the usages of their business.¹ Their liability commences with the delivery of the goods to them, and terminates with the delivery of the goods at their place of destination, or where they are to be delivered at the terminus of their route to a connecting carrier.² They are insurers of the goods received by them to be carried, against all casualties,³ except those which arise from the act of God, public enemies, the fault of the party, or the inherent qualities of the property itself.⁴ *Anything may be said to result from the act of God in the production of which man has no agency, immediate or remote, — as; injuries resulting from the elementary forces of Nature, unconnected with the agency of man, or other cause which could not have been prevented by the carrier by any act of his which could reasonably be required of him.*⁵ Loss by public enemies refers only to enemies

Y.) 346; Verner v. Sweitzer, 32 Penn. St. 208; Mershon v. Hohensack, 22 N. J. L. 372; Fuller v. Bradley, 25 Penn. St. 120; Samms v. Stewart, 20 Ohio, 69.

¹ Tunnel v. Pettijohn, 2 Harr. (Del.) 48; Powell v. Mills, 30 Miss. 231. The usages of the business and the representations which the carrier has made to the public, are invariably the guide to a proper decision as to the nature of the business. Bennett v. Peninsular, &c. S. B. Co., 6 C. B. 775; Crosly v. Fitch, 12 Conn. 410; Williams v. Grant, 1 Conn. 487; Richards v. Gilbert, 5 Day (Conn.), 415; DeMott v. Larraway, 14 Wend. (N. Y.) 225; Bell v. Reed, 4 Binn. (Penn.) 127; Johnson v. Midland Ry. Co., 4 Exchq. 367; Moriarty v. Harnden's Express, 1 Daly (N. Y. C. P.), 227; Michigan, &c. R. Co. v. McDonough, 21 Mich. 162. In this case, railway companies were held not to be common carriers of live stock. See also *Gt. Western Ry. Co. v. Blower*, L. R. 7 C. P. 655; *post*, § 452 b.

² Mobile, &c. R. Co. v. Weiner, 49 Miss. 725; Knight v. Providence, &c. R. Co., 13 R. I. 572. See *post*, § 452 a, where the liability for loss on connecting lines is considered.

³ Little Rock, &c. R. Co. v. Talbot, 47 Ark. 97.

⁴ Harris v. North Indiana R. Co., 20 N. Y. 232; Kohannon v. Hammond, 42 Cal. 227; Rixford v. Smith, 52 N. H.

355; Hall v. Renfro, 3 Metc. (Ky.) 51; Boston, &c. R. Co. v. Shidley, 107 Mass. 568; Williams v. Grant, 1 Conn. 487; Moses v. Morris, 4 N. H. 304; Harrell v. Owens, 1 D. & B. (N. C.) L. 273; Turner v. Wilson, 7 Yerg. (Tenn.) 340; Ewart v. Street, 2 Bailey (S. C.), 273. In *Coggs v. Bernard*, 1 Ld. Ray'd, 909, Lord Holt states the rule to be that a common carrier is liable for an injury to the goods against all casualties, except the "act of God and the king's enemies;" but latterly this rule has been somewhat modified or extended, and the carrier is, as stated in the text, held not to be liable where injury results to the goods from the fault of the party himself, or from some inherent quality or vice in the property itself, and the justice and wisdom of this rule is unquestionable.

⁵ Nugent v. Smith, 1 C. P. Div. 423; Nichols v. Mansland, L. R. 10 Exch. 258. Storms, tempests, lightning, and inevitable accidents not resulting from human agency, are acts of God within the meaning of the term as here employed. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods. *Oakley v. Portsmouth, &c. Co.*, 11 Exch. 622. Thus, where an action was brought against a common carrier for not safely carrying and delivering a quantity of

with whom the government is at open war, and does not include thieves, rioters, or insurgents.¹ But it does include depredations by pirates.² So, too, it includes injuries caused by insurgents who are warring against the government. Thus, where goods in the hands of a common carrier were destroyed by the confederate army, it was held that the carrier was not liable.³ Loss by the act of the

hops, and it appeared that a fire broke out in a building adjoining a booth, under which the carrier had placed the hops, and burned with inextinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action. *Forward v. Pittard*, 1 T. R. 33; *Hyde v. Trent Nav. Co.*, 5 T. R. 399. If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper coverings for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor. *Doct. & Stud.*, Dial. 2, ch. 38; *Noy*, ch. 43. It is not enough that they have been lost by the act of God, *if his own act or negligence has in any measure contributed to bring about the injury*. Thus, if he has departed from his line of duty, and has violated his contract in any respect, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have occurred, he is liable. *Read v. Spaulding*, 30 N. Y. 630; *Michaels v. New York, &c. R. Co.*, 30 N. Y. 564; *New Brunswick Co. v. Tiers*, 24 N. J. L. 697; *Hill v. Sturgeon*, 28 Mo. 323. When a carrier sets up *inevitable* accident, or the act of God, as a defence, the burden is upon him to show *not only that the injury resulted from a cause over which he had no control, but*

that his act has in nowise contributed to the injury, the presumption being against him. *Van Winkle v. South Carolina R. Co.*, 38 Ga. 32; *Day v. Ridley*, 16 Vt. 48; *Lawrence v. McGregor*, Wright (Ohio), 193; *Spencer v. Daggett*, 2 Vt. 92; *Avend v. Liverpool Steamship Co.*, 64 Barb. (N. Y.) 118; *The Rockett*, 1 Biss. (U. S.) 354; *Lewis v. Smith*, 107 Mass. 374; *Hall v. Renfro*, 3 Met. (Ky.) 51. It is sometimes said that *inevitable* accident and the act of God are synonymous terms when used in reference to the liability of a common carrier. *Neal v. Sanderson*, 9 Miss. 572; *Fish v. Chapman*, 2 Ga. 349. But this is not so where the carrier by means of public advertisements or otherwise has held himself out as insuring a safe delivery. *Morrison v. Davis*, 20 Penn. St. 171; *Harris v. Rand*, 4 N. H. 259. A baggage-master of defendant received plaintiff's three trunks, filled with drummer's samples, charged him with extra weight, and checked the trunks to another city. Shortly after they were received, the depot was flooded by a sudden rise in the river, and plaintiff's samples were injured. It was held that if the rise of the river was so sudden and unexpected that, with the exercise of all reasonable and proper diligence, the trunks could not be moved without being wet, the injury must be deemed attributable to an act of God, for which defendant was not responsible, but that, no objection having been made to taking the trunks because of their containing samples instead of ordinary personal baggage, and their carriage having been paid for, plaintiff, if he could recover at all, could recover their value. *Strouss v. Wabash, &c. R. Co.*, 17 Fed. Rep. 209.

¹ Jones on Bailments, 104.

² *Pickering v. Barclay*, 2 Roll. Abr. 248; *Barton v. Wolliford*, Comb. 56.

³ *Nashville, &c. R. Co. v. Estes*, 10 Lea (Tenn.), 749.

party embraces injuries which result from improper packing,¹ where the goods are apparently properly packed when delivered to the carrier; or by the intermeddling of the shipper after the transit has begun.² Loss resulting from the intrinsic character of the goods, as from decay, explosion, etc., cannot be charged to the carrier;³ it is rather to be attributed to the fault of the owner or shipper. Indeed where a party, without the knowledge of the carrier, ships dangerous articles, — as, articles of a highly combustible or explosive character, — instead of the carrier being liable to him for the loss, he is liable to the carrier for any damages sustained by him by reason of the burning or explosion of such articles while in transit, whereby his vehicles, or other property being transported by him, is injured.⁴

Where goods are taken out of the possession of the carrier under a valid legal process, he is discharged from further liability in reference thereto, — as, where they are attached upon *mesne* process, levied upon, or replevied.⁵ These are the only grounds upon which, independently of an express contract, the carrier can escape liability. At the common law, although goods are stolen by thieves, destroyed by fire, or injured through the wrongful act of third parties, the carrier is liable for their loss or for injury thereto.⁶

¹ *Northeastern Ry. Co. v. Richardson*, L. R. 7 C. P. 75. It is enough, however, for the consignor in the first instance to prove the condition of the goods when delivered to the carrier, and their condition when delivered to the consignee, and if damaged while in the hands of the carrier he is entitled to recover; and the fact that the damage was *partly* caused by defective packing, merely affects the amount of the recovery. *Higginbotham v. Great Northern Ry. Co.*, 2 F. & F. 796; *Stewart v. Crowley*, 2 Stark. 323.

² Where the cattle escape from the car through the negligence of the shipper, who interferes with the fastenings of car, there is no liability on the carrier's part. Thus, where, without the knowledge or consent of the carrier, the shipper insists on having the door of the car left open, he must bear the loss; he cannot shift it upon the carrier. *Roderick v. Baltimore, &c. R. Co.*, 7 W. Va. 54; *Hutchinson v. St. Paul, &c. R. Co.*, 37 Minn. 524.

³ *Kendall v. London, &c. Ry. Co.*, L. R. 7 Exch. 373.

⁴ *Boston, &c. R. Co. v. Shidley*, 107

Mass. 568; *Barney v. Burnstinlinder*, 64 Barb. (N. Y.) 612. So in reference to perishable property; if potatoes, apples, or fruit of any kind decay while in transit, without the fault of the carrier, he is not responsible for the loss, and to hold him so would be exceedingly unjust, and would doubtless result in carriers refusing to receive such property for transportation. *Kendall v. London, &c. Ry. Co.*, L. R. 7 Exch. 373.

⁵ *French v. Star Union Trans. Co.*, 134 Mass. 288.

⁶ *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent, &c. Nav. Co.*, 5 T. R. 389; *Gosling v. Higgins*, 1 Camp. 451; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Fairchild v. Slocum*, 19 Wend. (N. Y.) 331; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; opinion of COWEN, J., 21 Wend. (N. Y.) 198. See also *Crosby v. Fitch*, 12 Conn. 419; *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539; *Klauber v. American Express Co.*, 21 Wis. 21; *Southern Express Co. v. Newby*, 36 Ga. 635. See also *Howe v. Oswego, &c. R. Co.*, 56 Barb. (N. Y.) 121; *The Maggie Hammond*, 9 Wall. (U. S.)

To make a carrier subject to the stringent liability imposed by the common law on common carriers, there must be privity of contract, express or implied, between him and the person who employs him, and a right on his part to compensation for his services. There is no privity of contract between the sender of a letter by mail and the contractor with the government for carrying the mails, nor has the latter any right to compensation from the former; consequently he is not liable as a common carrier to the sender of the letter, although he be at the same time engaged in the business of a common carrier.¹

SEC. 425. Limitation of Liability by Contract.—In addition to the exemption from liability referred to in the last section, a carrier may by express contract limit his liability, provided the limitation is just and reasonable.² The limitation must, however, be imposed by

435; *Harrell v. Owens*, 1 D. & B. (N. C.) L. 273; *Colt v. McMechen*, 6 John. (N. Y.) 60; *Moses v. Norris*, 4 N. H. 304; *Kemp v. Coughtry*, 11 John. (N. Y.) 107; *Ewart v. Street*, 2 Bailey (S. C.), 157; *Williams v. Grant*, 1 Conn. 487; *Turner v. Wilson*, 7 Yerg. (Tenn.) 340; *Campbell v. Morse*, Harp. (S. C.) 469; *Gordon v. Little*, 8 S. & R. (Penn.) 533. And this rule extends to carriers by water as well as by land. *Daggett v. Shaw*, 3 Mo. 264; *Harrington v. Lyles*, 2 N. & McCord (S. C.) 88; *Clark v. Richards*, 1 Conn. 54; *Emery v. Hersey*, 4 Me. 411; *Boyle v. McLaughlin*, 4 H. & J. (Md.) 291. And the destruction of goods by fire is not such an act of God, unless occasioned by lightning, as excuses the carrier's liability. *Graff v. Bloomer*, 9 Penn. St. 114; *Parker v. Flagg*, 26 Me. 181; *Miller v. Steam Nav. Co.*, 10 N. Y. 431. But the rule does not extend to the time of delivery. *Parsons v. Hardy*, 14 Wend. (N. Y.) 215. A common carrier is only relieved from liability for such injuries as *must* be attributed to the act of God, and not merely for such as *may* be so attributed. If the injury is not the direct effect of the act of God, but is such as might not have happened but for the negligence of man, the carrier is liable. Therefore, where a violent storm caused an unusually low tide, and the carrier's barge, lying at the pier which he used, was pierced by a projecting timber, covered at ordinary tides, and known by the carrier to exist, it was held

that he was liable, notwithstanding that his individual negligence in leaving his barge there would not have produced the injury, without the concurrence of the act of God and the negligence of the wharf-builder. *New Brunswick Co. v. Tiers*, 24 N. J. L. 697.

¹ *Central R. & B. Co. v. Lampley*, 76 Ala. 357. A railroad being by law an established post-road, and the mails being carried along its route by the directions of the postoffice department of the government, the liability of the railroad company for the loss of mail matter is not that of a common carrier, but of a bailee for hire; and while it would be liable to the sender of a registered letter, if stolen or lost through the negligence or want of care of its agents or servants, the burden of proof is on the plaintiff to show that the theft or loss was caused by such negligence, and trover is not the proper form of action to enforce the liability. *Central R. & B. Co. v. Lampley*, 76 Ala. 357. See also *Sawyers v. Corse*, 17 Gratt. (Va.) 230.

² *Farmers', &c. Bank v. Champlain Trans. Co.*, 23 Vt. 186; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Baltimore, &c. R. Co. v. Skeels*, 3 W. Va. 556; *Wallace v. Matthews*, 39 Ga. 617; *Michigan, &c. R. Co. v. Heaton*, 31 Ind. 397, *n.*; *Express Co. v. Kountz*, 8 Wall. (U. S.) 341; *Lamb v. Camden, &c. R. Co.*, 2 Daly (N. Y.), 454; *Indianapolis, &c. R. Co. v. Allen*, 31 Ind. 394; *Southern Exp. Co. v. Purcell*, 37 Ga. 103; *Evansville, &c. R. Co. v. Young*,

express contract, and as a rule cannot be imposed by a mere general notice,¹—at least unless actual knowledge of the terms of such notice is brought home to the shipper, at the time he enters into the contract, the burden of establishing which is upon the carrier.² But the general rule is that the shipper's acceptance of a receipt, which contains the contract for exemption, is sufficient to make the contract binding on him whether he read it or not. A different view is maintained in some of the earliest cases;³ but as is now universally

28 Ind. 516; *McMillan v. Mich. Southern R. Co.*, 16 Mich. 69. "The law does not compel persons dealing with carriers to rely and insist upon this liability which it primarily imposes in their favor. In this, as in all other cases, the law recognizes the competency of parties to manage their own affairs and to make such contracts in respect of them as they deem most advantageous." *Michigan Central R. Co. v. Hale*, 6 Mich. 262. See also *Feige v. Mich. Central R. Co.*, 62 Mich. 1.

¹ *Hollister v. Nowlen*, 19 Wend. (N. Y.) 251; *Dewart v. Loamer*, 21 Conn. 245; *Kimball v. Rutland, &c. R. Co.*, 26 Vt. 247; *Judson v. Western R. Co.*, 6 Allen (Mass.), 486; *Michigan, &c. R. Co.*, 6 Mich. 243; *Moses v. Boston, &c. R. Co.*, 32 N. H. 523; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Smith v. N. Carolina R. Co.*, 64 N. C. 235; *Georgia R. Co. v. Gann*, 68 Ga. 350; *Alabama, &c. R. Co. v. Little*, 2 Alb. L. J. 141; *State v. Townsend*, 37 Ala. 247; *South, &c. R. Co. v. Henlein*, 56 Ala. 368; *Clark v. Faxon*, 21 Wend. (N. Y.) 153; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *York Co. v. Central R. Co.*, 3 Wall. (U. S.) 107; *Wallace v. Mathews*, 39 Ga. 617; *Express Co. v. Kountz*, 8 Wall. (U. S.) 341; *Simon v. The Fung Shuey*, 21 La. An. 363; *Lamb v. Camden, &c. R. Co.*, 2 Daly (N. Y.), 454; *Indianapolis, &c. R. Co. v. Allen*, 31 Ind. 394; *Michigan, &c. R. Co. v. Heaton*, 31 Ind. 397, *n.*; *Baltimore, &c. R. Co. v. Skeels*, 3 W. Va. 556; *New Orleans, &c. Ins. Co. v. New Orleans, &c. R. Co.*, 20 La. An. 302. As to proof of such contract, see *Southern Exp. Co. v. Purcell*, 37 Ga. 103; *Evansville, &c. R. Co. v. Young*, 28 Ind. 516; *McMillan v. Michigan Southern R. Co.*, 16 Mich. 79. In England, the common-law rule has al-

ways been held to be that the carrier may limit his liability so as to be exempt from responsibility for all losses except those resulting from his negligence; and that this limitation may be created by special contract, or, as was generally done, by public notice brought to the shipper's knowledge. *Batson v. Donovan*, 4 B. & Ald. 21; *Maning v. Todd*, 1 Starkie, 72, 186; *Riley v. Horne*, 5 Bing. 217; *Butt v. Gt. Western Ry. Co.*, 11 C. B. 140; 73 E. C. L. 139; *Hutchinson on Carr.* (2d ed.), § 229. The rule is now governed, however, by various statutes which it is unnecessary to review here, but the effect of which is that a carrier can only limit his liability by special contract. *Peik v. North Staffordshire Ry. Co.*, L. R. 10 H. L. Cas. 473; *Cohen v. Southeastern Ry. Co.*, 2 Exch. Div. 263; *Doolan v. Midland Ry. Co.*, L. R. 2 H. L. Cas. 792. These statutes, together with the former and present English law on this subject, will be found considered at length in *Hutchinson on Carriers* (2d ed.), §§ 225-234; 2 Am. & Eng. Ency. Law, pp. 811 *et seq.* Also in *N. Y. Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 251; *Sager v. Portsmouth, &c. R. Co.*, 31 Me. 228. See *post*, note 4, p. 1885.

² *Farmers' Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462; *Southern Exp. Co. v. Crook*, 44 Ala. 468; *Sager v. Portsmouth, &c. R. Co.*, 31 Me. 228; *Gott v. Dinsmore*, 111 Mass. 52; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 254; *Cole v. Goodwin*, 19 id. 251. In the last two cases it was held that notices placarded in conspicuous places in the offices, do not raise a presumption that the shipper knew of their contents.

³ See *Southern Express Co. v. Arm-*

known that neither individuals nor companies engaged as carriers undertake to assume the common-law liabilities of a common carrier, but issue receipts or give bills of lading containing certain limitations upon their liability, it seems to be generally conceded that the giving of such a receipt or bill of lading containing such limitations, and its acceptance by the shipper, raises a conclusive presumption that the shipper knew of and assented to such limitations.¹

The receipt containing the limitation in order to be of any effect must be delivered at the time of the acceptance of the goods for carriage, unless there is an agreement for its delivery afterwards;

stead, 50 Ala. 350; Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 319.

¹ Union Pac. R. Co. v. Marston, 30 Neb. 241; Belger v. Dinsmore, 51 N. Y. 166; Louisville, &c. R. Co. v. Oden, 80 Ala. 38; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Squires v. N. Y. Central R. Co., 98 Mass. 239; Hoadley v. Northern Transp. Co., 115 Mass. 304; Pemberton Co. v. N. Y. Central R. Co., 104 Mass. 144; Grace v. Adams, 100 Mass. 505; Gott v. Dinsmore, 111 Mass. 45. In these cases, as indeed in all of them, a distinction is made between restrictions contained in a mere receipt for goods and a bill of lading; and while actual knowledge of and assent to the restrictions in the case of a receipt is necessary, and the mere circumstance that the receipt contains such restrictions is not conclusive that the plaintiff knew thereof,—Gott v. Dinsmore, 111 Mass. 45,—yet in the case of a bill of lading, as it embodies the contract between the parties, the plaintiff will not be permitted, in the absence of fraud, to show that he did not read the bill of lading or know of such restrictions. Grace v. Adams, 100 Mass. 505; Evansville, &c. R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594; Farnham v. Railroad Co., 55 Penn. St. 53; King v. Woodbridge, 34 Vt. 565; Steers v. Steamship Co., 57 N. Y. 1; Huntington v. Dinsmore, 4 Hun (N. Y.), 66; Sneider v. Adams Express Co., 63 Mo. 376; Kallman v. Express Co., 3 Kan. 205; Kirkland v. Dinsmore, 62 N. Y. 171; Robinson v. Merchants' Despatch Co., 45 Iowa, 470; Swindler v. Hilliard, 2 Rich. (S. C.) 286; McMillan v.

Railroad Co., 16 Mich. 112; Boorman v. American Express Co., 21 Wis. 154; Steele v. Townsend, 37 Ala. 247. But in Illinois the rule is otherwise; and the mere acceptance of a receipt containing limitations upon the carrier's liability does not raise any presumption that the bailor knew thereof, and the carrier assumes the burden of establishing such knowledge and assent. Adams Express Co. v. Haynes, 42 Ill. 89; United States Express Co. v. Haynes, 67 Ill. 137; Anchor Line v. Dator, 68 Ill. 369; Adams Express Co. v. Stettaners, 61 Ill. 184; Field v. Chicago, &c. R. Co., 71 Ill. 458; Woodruff v. Sherard, 16 N. Y. S. C. 322; Madan v. Sherard, 73 N. Y. 329; Merchants' Despatch Co. v. Theilbar, 86 Ill. 71; Adams Express Co. v. King, 3 Ill. App. 316. In Merchants' Despatch Co. v. Cornforth, 3 Col. 280, a common carrier orally contracted, in winter, to transport a lot of oranges, lemons, and bananas in a refrigerator-car through from New York to Denver without change. After the fruit was loaded in the car, the carrier delivered to the owner's agent a bill of lading containing a printed condition not to be liable for injury occasioned by the weather, over which was written the words "general release." The fruit reached Denver in an ordinary box-car, and badly frozen. It was held that the carrier was liable for the damages. Morrison v. Phillips, &c. Construction Co., 44 Wis. 405; Brown v. Adams Express Co., 15 W. Va. 812; Michigan, &c. R. Co. v. Boyd, 91 Ill. 286; American Express Co. v. Spellman, 90 Ill. 455; Merchants' Despatch Co. v. Jeyser, 89 Ill. 43; Merchants' Despatch Co. v. Jaesting, 89 Ill. 152.

for, the carrier having accepted the goods without condition, its common-law liability immediately attaches, and it cannot alter it by subsequent limitations, except with the express assent of the shipper.¹ This assent of the shipper may, however, be implied where there has been an habitual course of dealing between the parties in which it was usual to deliver the receipts after the acceptance of the goods, and the same limitations were always made.²

It must be observed that in order for the limitation upon the carrier's liability to be of any effect, — that is, in order to presume the shipper's assent to them, — there must be a complete absence of anything approaching fraud or deceit. Thus, in a New York case,³ defendant's express-agent entered the train as it was approaching the station, and, as is the custom, solicited the patronage of passengers having baggage with them. The plaintiff handed him checks for his trunks, and received in exchange what purported to be a receipt therefor, containing on its face the number of the checks, the date, etc., and acknowledging the receipt of the trunks, stating that they were received subject to the limitations therein stated. Then followed, in much smaller print, a restriction upon the defendant's liability. The car was dimly lighted, and it was impracticable, if not impossible, for the plaintiff to read it there; moreover, it con-

¹ *Park v. Preston*, 108 N. Y. 434; *Mich. Central R. Co. v. Boyd*, 91 Ill. 269; *American Express Co. v. Spellman*, 90 Ill. 455; *Blossom v. Griffin*, 13 N. Y. 569; *Gaines v. Transportation Co.*, 28 Ohio St. 418; *Merchants' Despatch Co. v. Cornforth*, 3 Col. 280; 25 Am. Rep. 775; *Gott v. Dinsmore*, 111 Mass. 45. Nor can a bill of lading subsequently delivered alter the verbal contract already entered into. *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298; *Wheeler v. Railroad Co.*, 115 U. S. 29. "Possibly if, contemporaneously with the delivery of the goods to the railroad company, the shipper had received the bill of lading containing such stipulation, he would be conclusively presumed to have read it and to have acquiesced in it. *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus*, 73 Ala. 111. And this would have been no hardship, for he would then have had it in his power to reject the terms. Failing to read the contract he was accepting, might fairly be interpreted as an expression of full

confidence and an agreement to accept the terms they would offer. But this is not the case here." The principle has no application in this case, it appearing the carrier, having accepted the goods, made out an incomplete bill of lading which was not delivered to the shipper but to the consignee by mail. *STONE, C. J.*, in *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597, 601. In *McCulloch v. Wabash, &c. R. Co.*, 34 Mo. App. 23, the horse was injured while being put on the car, owing to the gang-plank being rotten. Subsequently, the shipper, being ignorant of the injury, signed a bill of lading which provided that the carrier should not be liable for loss incurred in loading, etc. It was held that the contract could not relate back and release the company from liability for the injury which had already occurred.

² *Shelton v. Merchants' Dist. Tel. Co.*, 59 N. Y. 258.

³ *Madan v. Sherard*, 73 N. Y. 329; 29 Am. Rep. 153.

tained several hundred words, and the agent disappeared before the reading could have been finished. The plaintiff, however, made no attempt to read it. On the trial of an action for the loss of the trunks the court charged that if plaintiff did not know that the receipt was given to him as a contract, and "received it, not knowing its contents, and supposing that it was given simply to enable him to trace his property, or as a mere receipt, then the plaintiff was not bound by its limitations;" and further, that "if the paper was handed to the plaintiff under such circumstances that he might have read it, and neglected to do so, he was bound by its contents." The jury having found for the plaintiff, the Court of Appeals held that there was nothing wrong in the instructions, and affirmed the judgment.¹

The validity of the special contract is destroyed if it is induced by anything like fraud or duress; it must have been freely and fairly entered into. The carrier cannot, therefore, enforce the shipper's assent by requiring it as a condition precedent to its acceptance of the goods for transportation. And if the carrier has two rates of charges for the carriage of goods,—one, when they are carried under a special contract, and the other when carried under its common-law liability,—*they must both be reasonable, and the shipper must have a genuine freedom of choice in making his selection.*²

¹ *Madan v. Sherard*, 73 N. Y. 329; 29 Am. Rep. 153; *Blossom v. Dodd*, 43 N. Y. 264; 3 Am. Rep. 701. See also *Camden, &c. R. Co. v. Baldauf*, 16 Penn. St. 67; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *McMillan v. Mich. Southern R. Co.*, 16 Mich. 79. Where, after the delivery of the goods to the carrier, a receipt is given to the owner, containing a printed stipulation limiting the carrier's liability, but which is so obscured by a revenue stamp as to be rendered illegible, the stipulation cannot be set up as limiting the liability of the carrier; the shipper's assent cannot be presumed in such a case. *Perry v. Thompson*, 98 Mass. 249.

In Pennsylvania, the rule is that the carrier may limit his liability by a general notice, but its terms must be clear and explicit; and the party with whom the carrier deals must be fully informed of the terms and its effects. The exception goes on the ground of a contract, express and implied; and where the notice was in the English language, and the passenger was a

German who did not understand the English language, it was held to be incumbent on the carrier to prove that the passenger had knowledge of the limitation; and if tickets, without anything more, are evidence of a special contract, yet they must be printed in a language which the passenger understands, or their terms must be explained to him. *Camden, &c. R. Co. v. Baldauf*, 16 Penn. St. 67.

² *Atchison, &c. R. Co. v. Dill*, 48 Kan. 210; *Kansas Pacific R. Co. v. Nichols*, 9 Kan. 236; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. Where the carrier has not given its customers the choice of shipping under a bill of lading without the clause exempting it from liability from loss by fire, the acquiescence of the general shipping public in the form of the bill of lading containing the fire clause, does not establish the reasonableness of the exemption. And where a loss occurs by fire, the company cannot set up the exemption, although its officers testify that if the shipper had so requested, his goods

As to the extent to which the limitation of the carrier's liability may go, the better doctrine is that, while he may by special contract limit his liability as an insurer, — as, for the loss of the goods by fire, and other casualties which are not the result of his negligence, — *yet he cannot restrict it so as to excuse himself from loss or damage resulting from the negligence of his servants or agents.*¹ And in these as in other cases, the burden rests upon the shipper to establish the negligence of the carrier as the proximate cause of the loss.² In New York and some other States, it has been held that the carrier may, by an explicit special contract, limit his liability against loss or damage resulting even from the negligence of his agents or servants.³ The same rule appears to prevail in England, but the doctrine there is affected by the provisions of the Carriers' Act.⁴ And

would have been shipped at a higher rate, and under a bill of lading in which the exemption clause was left out. *Louisville, &c. R. Co. v. Gilbert*, 88 Tenn. 430.

¹ *Rantoul v. N. Y. Central R. Co.*, 17 Fed. Rep. 505; *Branch v. Wilmington, &c. R. Co.*, 88 N. C. 573; *Georgia, &c. R. Co. v. Gann*, 68 Ga. 350; *Mitchell v. Georgia R. Co.*, 68 Ga. 644; *Chicago, &c. R. Co. v. Mass*, 60 Miss. 1003; *Chicago, &c. R. Co. v. Abels*, 60 Miss. 1017; *Little Rock, &c. R. Co. v. Talbot*, 39 Ark. 523; *Ohio, &c. R. Co. v. Selby*, 47 Ind. 471; *Berry v. Cooper*, 28 Ga. 543; *Reno v. Hogan*, 12 B. Mon. (Ky.) 63; *Penn. R. Co. v. Butler*, 57 Penn. St. 335; *Ashmore v. Penn. R. Co.*, 28 N. J. L. 180; *Southern Express Co. v. Moon*, 39 Miss. 822; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; *Perry v. Thompson*, 98 Mass. 249; *Judson v. Western R. Co.*, 6 Allen (Mass.), 486; *Pemberton County v. N. Y. Central R. Co.*, 104 Mass. 144; *Grace v. Adams*, 100 Mass. 505; *Medfield School Dist. v. Boston, &c. R. Co.*, 102 Mass. 552; *New Orleans, &c. R. Co. v. Faler*, 58 Miss. 511; *Shriver v. Sioux City, &c. R. Co.*, 24 Minn. 506; *Louisville, &c. R. Co. v. Brownlee*, 14 Bush (Ky.), 590; *Chicago, &c. R. Co. v. Hale*, 2 Ill. App. 150; *Kansas Pacific R. Co. v. Reynolds*, 17 Kan. 251; *United States Exp. Co. v. Bachman*, 28 Ohio St. 144; *Clark v. St. Louis, &c. R. Co.*, 64 Mo. 440; *Camp v. Hartford, &c. Steamboat Co.*, 43 Conn. 333; *Bank of Kentucky v. Adams Ex-*

press Co., 93 U. S. 174; *American Exp. Co. v. Shier*, 55 Penn. St. 140; *Southern, &c. R. Co. v. Henlim*, 52 Ala. 606; *Nashville, &c. R. Co. v. Johnson*, 6 Heisk. (Tenn.) 271; *Penn. R. Co. v. Butler*, 57 Penn. St. 335; *Penn. R. Co. v. McClosky*, 23 Penn. St. 536; *Farnham v. Camden, &c. R. Co.*, 55 Penn. St. 53; *American Exp. Co. v. Sands*, 55 Penn. St. 53; *Evansville, &c. R. Co. v. Young*, 28 Ind. 516; *Seller v. Pacific, &c. R. Co.*, 1 Oreg. 409; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Davidson v. Graham*, 2 Ohio St. 131; *Southern Express Co. v. Moon*, 39 Miss. 822; *Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97; *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. (N. Y.) 97.

² *Witting v. St. Louis, &c. R. Co.*, 28 Mo. App. 103. *Contra*, *Southern Express Co. v. Seide*, 67 Miss. 609; 7 So. Rep. 547.

³ *Mangin v. Dinsmore*, 56 N. Y. 163; *Wilson v. N. Y. Central R. Co.*, 97 N. Y. 88; *Westcott v. Fargo*, 61 N. Y. 542; *Poucher v. N. Y. Central R. Co.*, 49 N. Y. 263; *Spinatti v. Atlas S. S. Co.*, 81 N. Y. 71; *Rissell v. N. Y. Central R. Co.*, 25 N. Y. 442; *Baltimore, &c. R. Co. v. Rathbone*, 1 W. Va. 87; *Farmers', &c. Bank v. Champlain Trans. Co.*; 23 Vt. 186. *Compare Canfield v. Baltimore, &c. R. Co.*, 93 N. Y. 532.

⁴ In the case of *Great Northern R. Co. v. Morville*, 7 Ry. Cas. 830; 16 Jur. 528, M. took a horse to the station of a railway company to be shipped over its

where by the bill of lading the carrier is exempt from loss by fire, unless the same is proved to have occurred from the "fraud or gross negligence of the carrier, his servants or agents," the burden is upon a party seeking to recover for a loss, to show that the fire resulted from one of the causes specified.¹ But it is held that where the fact of injury is established, and negligence on the part of the carrier is shown, to which, as a cause, the injury can reasonably be imputed, the question as to whether it was so occasioned, is one of fact for the jury; and that the failure of the carrier to deliver the property, or any portion thereof, to the consignee on demand at the place of destination is *prima facie* evidence of negligence, which in the absence of any evidence excusing the non-delivery, will authorize a verdict for the shipper.² But even in these jurisdictions the contract for exemption is always construed strictly, and confined to cases where the stipulation is clear and express, and is manifestly intended to cover the case in hand.³

road. On paying for the carriage, he received a ticket on which was printed: "This ticket is issued subject to the owner's undertaking to bear all risk of injury by conveyance and other contingencies. The company will not be responsible for any damage, however caused, to horses traveling on their railway or in their vehicles." In course of the transportation the horse was injured in a collision, resulting from a want of due care, but not from any wilful misconduct or gross negligence on the part of the company's servants. It was held that there was a special contract between the parties, the ticket being more than a mere public notice; that the contract was valid and protected the company from any liability for the injury done to the horse. See, for a similar case, *Chippendale v. Lancashire, &c. Ry. Co.*, 7 Ry. Cas. 824; 15 Jur. 1106. There are numerous other English cases holding that such a stipulation on the ticket is a valid special contract which will relieve the company from liability even for the consequences of the negligence of its servants. *Carr v. Lancashire, &c. Ry. Co.*, 7 Exch. 707; 7 Ry. Cas. 426; 17 Jur. 397; *Shaw v. York, &c. Ry. Co.*, 6 Ry. Cas. 87; 66 E. C. L. 347; 13 Q. B. 347; 13 Jur. 385; *Austin v. Manchester, &c. Ry. Co.*, 16 Q. B. 600; 15 Jur. 670; 10 C. B. 454; 16

Jur. 763. But all these cases depended upon the statutes of 11 Geo. IV. and 1 William IV., c. 68, and, moreover, were cases involving the carriage of animals. They cannot be considered as stating any common-law rule. The terms of the statute, by very plain implication, allow the carrier to stipulate for exemption from liability for all losses except those occasioned by the "felonious acts" of its servants. See *Crabb's Digest of the Statutes*, vol. ii., pp. 288, 289, § 8. Compare also with the above cases, *McManus v. Lancashire, &c. Ry. Co.*, 4 H. & N. 327; *Alldridge v. Gt. Western Ry. Co.*, 15 B. C. N. s. 582; 109 E. C. L. 582.

¹ *Platt v. Richmond, &c. R. Co.*, 108 N. Y. 358.

² *Canfield v. Baltimore, &c. R. Co.*, 98 N. Y. 532. See *Jennings v. Grand Trunk R. Co.*, 121 N. Y. 438.

³ *Westcott v. Fargo*, 61 N. Y. 542; *Maynard v. Syracuse, &c. R. Co.*, 71 N. Y. 180; *Holsapple v. Rochester, &c. R. Co.*, 86 N. Y. 275. See also *Deming v. Merchants' Compress Co.*, 90 Tenn. 306, 320. The contract will not be construed as exempting the carrier from liability for his own negligence, unless the intent is so plainly and distinctly expressed as that it cannot be misunderstood by the shipper; it cannot be inferred from general words

But, as before stated, in most of the States, while the carrier may impose reasonable limitations upon his liability, he cannot by any provision, however explicit or direct, screen himself from liability for loss or injury resulting from his own or his servants' negligence. The principal ground upon which the right of a carrier to limit his liability by contract, in any manner he pleases, can be denied, is that by reason of the public character of his business such contracts are opposed to public policy; and in view of the variety and extent of the interests involved, it seems to us that this position is well grounded, and it is certainly sustained by the great weight of American authority. In some of the States this rule is enforced by statutes which prohibit carriers from contracting for any exemption from liability. Such statutes, however, can only be operative as to goods shipped from one point in the State to another, and cannot affect shipments to points in foreign States.¹ The validity of

in the contract. In the case below, the plaintiff shipped a quantity of fruit-trees by the defendant's road; the shipping contract, among a great number of special exemptions from liability on the part of the carrier, contained the following, for "damage occasioned by delays from any cause or from change of weather." The trees were lost by the negligent delay of the defendant in the transportation. In an action to recover damages, it was held that such a loss was not covered by the exemption, and that the defendant was liable. *Nichols v. N. Y. Central R. Co.*, 89 N. Y. 370. So also it is held that a stipulation exempting the carrier from liability for loss occasioned by the negligence of its servants, does not exempt the carrier from liability for its own negligence. *Weinberg v. National Steamship Co.*, 57 N. Y. Super. Ct. 586; 8 N. Y. Supp. 195. So where the carrier gives two notices, he is bound by the one which restricts his liability the least. *St. Louis, &c. R. Co. v. Smuck*, 49 Ind. 302; *Edsall v. Railroad Co.*, 50 N. Y. 661; *Munn v. Baker*, 2 Starkie, 255. In the case of *Deming v. Merchants' Cotton Press Co.*, 90 Tenn. 306, 320, the bill of lading contained valid fire-clauses providing for exemption from liability for loss by fire in general terms, or "while in depots or places of trans-shipment," or "while waiting at depots or stations," or "while in tran-

sit or at stations." The court held that the carrier was nevertheless liable for a loss by fire, not caused by its negligence, which occurred after the delivery of the cotton to it, but while it remained in the warehouse of the compress company awaiting compression for shipment. See *Brown v. Louisville, &c. R. Co.*, 36 Ill. App. 140, construing a similar provision. The carrier cannot, after making the contract with the shipper, insist on additional stipulations with the shipper's agent who delivers the goods; and stipulations signed by such agent without the knowledge of his principal are not binding. *Jennings v. Grand Trunk, &c. R. Co.*, 127 N. Y. 438. In this case the court held also that a stipulation that the carrier would not be responsible for delay in the transit, did not relieve it from liability for a delay caused by its own negligence. Compare *Brown v. Louisville, &c. R. Co.*, 36 Ill. App. 140.

¹ *Missouri Pac. R. Co. v. International Mar. Ins. Co.*, 84 Tex. 149; 19 S. W. Rep. 459; *Platt v. Richmond, &c. R. Co.*, 108 N. Y. 358; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125. See also *Missouri Pac. R. Co. v. Vandeventer*, 26 Neb. 222.

The weight of authority is overwhelmingly in favor of the rule as announced, that the carrier may limit its common-law liability as insurer, but not its liability for the consequences of its own negligence,

the contract is to be determined by the *lex loci contractus*, and a stipulation exempting the carrier from all liability, even for the consequences of negligence, being valid in the District of Columbia where it was made, can be enforced in Pennsylvania, though such contracts are not recognized if made in the latter State.¹

Another class of stipulations are those in which it is provided that the carrier shall not be liable in any case except for damages to the amount stated in the bill of lading as the value of the goods. The carrier has a right to require the shipper to fix a valuation on his goods by which he will be bound in case of loss. There is nothing unreasonable in such a requirement, seeing that the charges for transportation are regulated in a great measure by the extent of risk assumed.² Thus, in a case in New York,³ the carrier received

or that of its servants. In addition to cases already cited, see *Mobile, &c. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Louisville, &c. R. Co. v. Oden*, 80 Ala. 38; *Nicoll v. East Tennessee, &c. R. Co.*, 89 Ga. 260; *Chicago, &c. R. Co. v. Chapman*, 133 Ill. 96; *Indianapolis, &c. R. Co. v. Forsythe*, 4 Ind. App. 326; *Hall v. Chicago, &c. R. Co.*, 41 Minn. 510; *Boehl v. Chicago, &c. R. Co.*, 44 Minn. 191; *Johnson v. Alabama, &c. R. Co.*, 69 Miss. 191; *Doan v. St. Louis, &c. R. Co.*, 38 Mo. App. 408; *Durgin v. American Express Co. (N. H.)*, 20 Atl. Rep. 328; *Louisville, &c. R. Co. v. Dies*, 91 Tenn. 177; *Galveston, &c. R. Co. v. Ball*, 80 Tex. 602; *Monroe v. The Iowa*, 50 Fed. Rep. 561; *Woodburn v. Cincinnati, &c. R. Co.*, 40 Fed. Rep. 731; *Liverpool, &c. S. S. Co. v. Phoenix Ins. Co.*, 129 U. S. 464.

¹ *Fairchild v. Philadelphia, &c. R. Co. (Penn. St.)*, 24 Atl. Rep. 79, following *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Mich. Central R. Co. v. Boyd*, 91 Ill. 268; *Hazel v. Chicago, &c. R. Co.*, 82 Iowa, 477; *Brown v. Louisville, &c. R. Co.*, 36 Ill. App. 140. Compare *In re Missouri Steamship Co.*, 42 Ch. Div. 321.

² *Louisville, &c. R. Co. v. Oden*, 80 Ala. 38; *Zimmer v. N. Y. Central R. Co.* 16 N. Y. Supp. 631; *Coupland v. Housatonic R. Co.*, 61 Conn. 531; *Duntley v. Boston, &c. R. Co. (N. H.)*, 20 Atl. Rep. 327; *Zouch v. Chesapeake, &c. R. Co.*, 36 W. Va. 524 (the rule of the text is true except where loss results from "gross negligence or wantonness"); *Starnes v. Louis-*

ville, &c. R. Co., 91 Tenn. 516; *Louisville, &c. R. Co. v. Sowell*, 90 Tenn. 17; *York Co. v. Railroad Co.*, 3 Wall. (U. S.) 107; *Peafse v. Steamship Co.*, 24 Fed. Rep. 285; *The Lydian Monarch*, 23 Fed. Rep. 298; *Harvey v. Terre Haute, &c. R. Co.*, 74 Mo. 538; *South, &c. R. Co. v. Heinlein*, 52 Ala. 606; 56 Ala. 368; *Southern Express Co. v. Seide*, 67 Miss. 609. In such cases the shipper may recover the amount stipulated as the value of the goods, although they are not destroyed, but merely damaged badly; and the carrier cannot insist on their value as damaged being deducted from the stipulated value. *Starnes v. Louisville, &c. R. Co.*, 91 Tenn. 516. "The question is not," said the court, "what did each animal bring in the market in its injured condition, but rather, to what extent, and in what amount, not above \$100 (the stipulated value), was it damaged through the fault of the defendant. Not what value is left in the animal, but what elements of value were wrongfully taken away. To illustrate: a horse shipped under such a contract loses one eye through the negligence of the carrier, and the owner sues for damages. The question in such a case is, How much has the animal been damaged by the loss of the eye? And not, Will he sell for as much as \$100 with but one eye? The true measure of liability under the contract is the amount of actual damage resulting from the negligence of the carrier, in no case to exceed the sum stipulated."

³ *Belger v. Dinsmore*, 51 N. Y. 173.

from the shipper a trunk to be transported from Baltimore to New York. It gave him a receipt, which, among other things, contained a statement that, as a part of the consideration of the contract, it was agreed that the holder should not, in case of loss, demand beyond the sum of fifty dollars, at which the article was thereby valued, unless otherwise expressed. In an action for the loss of the trunk, it was held that by accepting the receipt and omitting to have a different value expressed, plaintiff had assented to the valuation at fifty dollars and to the clause limiting his claim to that sum. "It is reasonable to assume," said the court, "that the price or compensation for the transportation of property was fixed with reference to the restricted or limited liability assumed on agreeing to transport it, and is to a great degree regulated and graduated by its value; and if the party only pays the price fixed for articles of small value, or estimated at a low sum, he himself assumes all risks beyond that value or price. . . . Plaintiff was willing and agreed to assume all risks for the excess in value, and to relieve the company from all liability on account thereof beyond that sum. He can with no more propriety or justice claim remuneration therefor than the company could demand additional freight thereon."¹ In those jurisdictions, however, where the carrier is not allowed to limit his liability for losses caused by his negligence, the courts hold that such a limitation is valid only as regards losses not caused by the carrier's negligence; that if the loss is the result of negligence, the shipper is entitled to prove the true value of his shipment and recover that amount without regard to the value as stipulated in the contract.²

¹ An exactly similar case is seen in *Ballou v. Earle* (R. I.), 22 Atl. Rep. 1113, where the same view was upheld; also in *Express Co. v. Foley*, 46 Kan. 457.

² *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Pennsylvania R. Co. v. Weiller* (Penn.), 19 Atl. Rep. 702; 26 W. N. Cas. 27; *Grogan v. Express Co.*, 114 Penn. St. 523; *Ft. Worth, &c. R. Co. v. Greathouse*, 82 Tex. 104; *Louisville, &c. R. Co. v. Owens* (Ky.), 19 S. W. Rep. 590; *Alabama, &c. R. Co. v. Little*, 71 Ala. 611; *Louisville, &c. R. Co. v. Wynn*, 88 Tenn. 330; *Chicago, &c. R. Co. v. Abels*, 60 Miss. 1017; *Southern Express Co. v. Moon*, 39 Miss 822; *Black v. Transportation Co.*, 55 Wis. 319; *Kansas City, &c. R. Co. v. Simpson*, 30 Kan. 645;

Moulton v. St. Paul, &c. R. Co., 31 Minn. 85; *U. S. Express Co. v. Backman*, 28 Ohio St. 144.

In this connection, CALDWELL, J., speaking for the court in *Louisville, &c. R. Co. v. Wynn*, 88 Tenn. 327, very sensibly remarks: "We think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of the property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-nine-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter it may thereby substantially evade and nullify the

But there is nothing in this doctrine to prevent the carrier from agreeing with the shipper beforehand upon the value of the property, which value shall be conclusive as to the carrier's liability in case the goods are lost. According to the Supreme Court of the United States, "where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation."¹ But there must, in such cases, be an agreed valuation, actually and expressly assented to by the shipper; his mere acceptance of a receipt containing the valuation would not be sufficient unless he had full knowledge of its contents and expressly assented to their provisions.²

A carrier may stipulate that it will not be liable for any losses occurring on connecting lines.³ As will be seen, in a great number

rule, which says it shall not do to the former, and in that way do indirectly what it is forbidden to do directly."

The Arkansas courts hold, however, that if there is a provision in the bill of lading, fairly entered into, limiting the carrier's liability to \$50 for each of several animals, and such limitation is based on a reduction in the charge made for transportation, it must be enforced, although the actual value of each animal is \$600, and the loss is the result of the carrier's negligence. *St. Louis, &c. R. Co. v. Weakley*, 50 Ark. 397; 35 Am. & Eng. R. Cas. 635. See also *Squires v. N. Y. Central R. Co.*, 98 Mass. 239. The Supreme Court of Appeals of Virginia has, in a similar case, reached a similar conclusion. *Richmond, &c. R. Co. v. Payne*, 86 Va. 481.

¹ Mr. Justice BLATCHFORD in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. See this view upheld in *Louisville, &c. R. Co. v. Sowell*, 90 Tenn. 17; *Louisville, &c. R. Co. v. Wynn*, 88 Tenn. 330 (where the distinction is very clearly drawn); *Graves v. Lake Shore, &c. R. Co.*, 137 Mass. 33; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178 (quoting with

approval the language of Mr. Justice BLATCHFORD); *Louisville, &c. R. Co. v. Oden*, 80 Ala. 38; *Richmond, &c. R. Co. v. Payne*, 86 Va. 481. The courts of Texas, however, deny the validity of stipulations of the character referred to in the text.

Taylor, &c. R. Co. v. Montgomery (Tex.), 16 S. W. Rep. 178, 182; *Galveston, &c. R. Co. v. Ball*, 80 Tex. 602. See also *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300; *International, &c. R. Co. v. Anderson (Tex.)*, 21 S. W. Rep. 691.

The Texas courts also hold that a stipulation in the contract of shipment that when the carrier furnishes the shipper with laborers to assist in loading and unloading his goods, they shall be deemed the shipper's servants while so engaged, and that the carrier will not be responsible for their acts, is void as an attempt to release the carrier from responsibility for the negligences of its own servants. *Missouri Pac. R. Co. v. Smith (Tex.)*, 16 S. W. Rep. 803.

² See *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 330.

³ *McCarn v. International, &c. R. Co.*, 84 Tex. 352; *Texas & Pac. R. Co. v. Adams*, 78 Tex. 372; *Gulf, &c. R. Co.*

of jurisdictions the carrier is held liable only for losses occurring on its own line, unless it has specially contracted for liability throughout the entire route.¹ And notwithstanding a statute which provides for through liability, a carrier receiving goods consigned to a point beyond its line, may limit its liability to its own line by issuing a bill of lading to its terminal point only, and expressly stating therein that it will carry the goods no farther, and will not be liable for loss occurring beyond its own line.²

Limitations embraced in the bill of lading, signed by the initial carrier and the shipper, enure to the benefit of connecting carriers, unless there is something to indicate that the parties clearly intended that their operation should be confined to the line of the initial carrier. If the first carrier assumes liability over the whole route, either voluntarily or under the rules of law adopted in many of the States, the authorities concede the correctness of this proposition.³ But it is often said that where the first carrier's liability is to terminate with delivery to the connecting carrier, such limitations cannot be claimed by connecting carriers. "The succeeding carriers," it is said, "are in nowise his [the initial carrier's] agents, but carry for the owner of the goods, and cannot claim the benefit of immunities for which he contracted."⁴ This view is not believed to be correct; even in such cases the agent of the first carrier admittedly acts as agent for his own line and for the connecting lines, and it is difficult to see with what reason it can be claimed that the connecting carriers are bound by the obligations imposed by the initial carrier's acceptance of the goods, and not entitled to the limitations created by the same contract. The better view is that the obligations imposed and the immunities secured by the bill of lading belong equally to all the connecting carriers.⁵

v. Vaughn (Tex.), 16 S. W. Rep. 775; *Dunbar v. Port Royal R. Co.*, 36 S. C. 110. In this case the defendant carrier, having received the goods, carried them to the end of its line and delivered them to the connecting carrier, who refused to receive them until the freight was paid, thus damaging the goods by delay. It was held that the first carrier could not be held liable, the bill of lading limiting its liability to losses on its own line.

¹ See *post*, § 452*a*; *McCarr v. International, &c. R. Co.*, 84 Tex. 354; *Mich. Cent. R. Co. v. Myrick*, 107 U. S. 102.

² *Glass Co. v. Ohio, &c. R. Co.*, 44 Mo. App. 416, 421; *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517; *Dimmit v. Railroad Co.*, 103 Mo. 433. In *Barker v. Missouri Pac. R. Co.*, 34 Mo. App. 98, however, the court holds that the statute establishes a rule of public policy which the carrier may not evade by contract.

³ See *Hutchinson on Carriers* (2d ed.), §§ 271-273, reviewing *Maghee v. Camden, &c. R. Co.*, 45 N. Y. 514.

⁴ *Hutchinson on Carriers* (2d ed.), § 273.

⁵ *W. U. Telegraph Co. v. Carew*, 15

The carrier may provide that it will not be liable unless the shipper presents his claim in writing, within a certain period after delivery, provided, of course, the time limited is not so short as to be unreasonable.¹ Thus, a stipulation that no claim for loss or damage will be allowed unless the same is made in writing before or at the time the stock is unloaded, being intended to prevent fraud upon the company, is valid and may be upheld.² But it seems that if

Mich. 525; *Western R. Co. v. Harwell*, 91 Ala. 340; 8 So. Rep. 649; *Babcock v. Lake Shore, &c. R. Co.*, 49 N. Y. 491.

In *Whitworth v. Erie R. Co.*, 87 N. Y. 413, the plaintiff shipped at Memphis various lots of cotton for transportation to Liverpool, under through contracts with certain despatch companies and steamboat companies, the former contracting to carry the cotton to Jersey City. The bills of lading contained clauses to the effect that the respective companies "and their connections" should not be liable for loss or damage by fire to the property while in transit or while in deposit or places of transshipment, or at depots or landings at points of delivery. The defendant's road formed part of a continuous line of railroad from Memphis to New York, and as intermediate carrier it received the cotton for transportation over its line, and carried it to Jersey City, where a portion of it, then in its freight house, was destroyed by fire. The defendant was not a member of either of the despatch companies, and the latter were not owners of any of the railroads over which the cotton was transported, but used them in the performance of their contracts. In an action to recover for the loss, it was held that the defendant was entitled to the benefit of the restriction clauses in the bills of lading, and was not liable unless the fire resulted from its negligence; that it was incumbent on the plaintiffs, in order to avoid the effects of the exemption, to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of duty, which contributed to the loss. *Whitworth v. Erie R. Co.*, 87 N. Y. 413.

¹ *Southern Express Co. v. Hunnicut*, 54 Miss. 566; *Southern Express Co. v. Glenn*, 16 Lea (Tenn.), 472; 86 Tenn. 594; *U. S. Express Co. v. Harris*, 51 Ind. 127

(thirty days not unreasonable — the case of *Adams Express Co. v. Reagan*, 29 Ind. 21, explained); *Lewis v. Gt. Western Ry. Co.*, 5 H. & N. 867 (requiring claim to be made within three days after delivery, not unreasonable); *Gulf, &c. R. Co. v. Trawick*, 68 Tex. 314 (sixty days reasonable); *Chicago, &c. R. Co. v. Simms*, 18 Ill. App. 68 (five days reasonable); *Weir v. Express Co.*, 5 Phila. (Penn.) 355. Such stipulations are always made in contracts for the transmission of messages, by telegraph, and have been universally upheld. See article "Telegraphs," in *Am. & Eng. Ency. Law*; *Thompson on Electricity*, §§ 245-256; *Wolf v. W. U. Telegraph Co.*, 62 Penn. St. 83; 1 Am. Rep. 387, 389. Compare, however, *Southern Express Co. v. Caperton*, 44 Ala. 101; *Johnston v. W. U. Telegraph Co.*, 33 Fed. Rep. 365. The carrier may limit its liability to damages claimed by the shipper under oath within five days after delivery of the goods. *Black v. Wabash, &c. R. Co.*, 111 Ill. 351 (no defence that shipper did not read the stipulation, no fraud having been practised). The question as to the reasonableness of any particular limitation as to the time within which the claim may be presented is for the jury. *Texas, &c. R. Co. v. Adams*, 78 Tex. 372. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts." *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264.

² *Goggin v. Kansas City, &c. R. Co.*, 12 Kan. 416; *Sprague v. Missouri Pac. R.*

the claim is presented within a reasonable time after the unloading, it will suffice, as such provisions in the contract of carriage are always to be given a reasonable construction in the shipper's favor, being a restriction upon his common-law right.¹ It seems that a limitation of thirty-six hours is too short,² though it has been enforced in some cases. The carrier may also provide that suit must be instituted within forty days after the occurrence of the damage,³ but it appears that such a stipulation ought not to be favored.

The construction of the contract is a matter of law, and belongs to the court alone, which must look at all the surrounding circumstances and the course of dealing between the parties, and then see what is the meaning of the terms employed, when used in reference to those surrounding circumstances and the course of dealing.⁴ The special circumstances, if any, are to be ascertained as facts by the jury.⁵ A special contract will not be construed to exempt the com-

Co., 34 Kan. 347; *Rice v. Kansas City, &c. R. Co.*, 63 Mo. 314; *Dawson v. St. Louis, &c. R. Co.*, 76 Mo. 514; *St. Louis, &c. R. Co. v. Cleary*, 77 Mo. 634; 16 Am. & Eng. R. Cas. 122; *Wabash, &c. R. Co. v. Black*, 11 Ill. App. 465.

¹ *Oxley v. St. Louis, &c. R. Co.*, 65 Mo. 629; *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.), 48. See also *Evans v. Dunbar*, 117 Mass. 546. Therefore a stipulation that the claim shall be made at the time of the receipt of goods, and before the consignee could have any opportunity to examine and inspect them or ascertain whether any injury had been done is unreasonable. *Memphis, &c. R. Co. v. Holloway*, 9 Baxt. (Tenn.) 188. Where the contract of shipment provides that all claims for injuries to the stock shipped must be presented in writing before the stock are taken from the yard, the consignee has a reasonable time after their removal in which to present a claim for injuries not discoverable by the use of ordinary diligence at the time of removal. *Western R. Co. v. Harwell*, 91 Ala. 340. See also *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202.

² *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438; *Gulf, &c. R. Co. v. Trawick* (Tex.), 18 S. W.-Rep. 948. In *Texas & Pac. R. Co. v. Adams*, 73 Tex. 372, the bill of lading provided that claims for loss or damage must be presented to the de-

livering line, must be presented within thirty-six hours after the arrival of the freight. The consignee who resided a short distance from the depot, received the goods Saturday afternoon, but did not open them until Monday, having been unwell during the interval. It was held that the reasonableness of the stipulation was, under the circumstances, a question for the jury.

³ *Gulf, &c. R. Co. v. Gatewood*, 79 Tex. 89; 14 S. W. Rep. 913. Compare *Pacific Express Co. v. Darnell* (Tex.), 6 S. W. Rep. 765.

⁴ *Lewis v. Great Western Ry. Co.*, 3 Q. B. D. 45; *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473.

⁵ *Neilson v. Harford*, 8 M. & W. 823; *Lewis v. Great Western Ry. Co.*, 3 Q. B. D. 45. A provision that in case of loss the carrier shall have the benefit of any insurance on the goods does not entitle the carrier to receive the insurance, or a tender thereof, before an action can be brought against it for the loss. Nor can the failure to receive such money be set up by way of counter-claim unless it appears that the shipper had actually received the money and refused to allow the carrier the benefit of it. *Inman v. South Carolina R. Co.*, 129 U. S. 126. See also *Jackson v. B. M. Ins. Co.*, 139 Mass. 508. In the case of *Platt v. Richmond, &c. R. Co.*, 108 N. Y. 358, the bill of lading contained a stipulation to the effect that, in case of any loss

pany from even the excepted perils *when the negligence of the company contributed to the loss by such excepted perils*. Thus, a condition relieving against injury in the delivery of cattle occasioned by the restiveness of the animals, was held no defence where, although the injury was caused by the restiveness of the animals, the company had not used reasonable precaution to guard against the consequences of such restiveness.¹ So, if the injury arose from the defects of the station.² And a stipulation that the company shall not be liable for leakage or breakage will not relieve them from such damage or loss caused by their own neglect.³

A contract relating to one matter will not be construed to relieve the company from loss from an entirely distinct matter. Thus, a contract to carry at "owner's risk," means that whatever happens on the journey is to be at the owner's risk, and does not relieve the company from liability under their implied independent contract to carry and deliver within a reasonable time.⁴ Where by their contract the company are to be liable only for negligence, the *onus* of proving negligence lies on the plaintiff.⁵ So, if the company contracts that it will not be liable "except upon proof that the loss, damage, or delay arose from the wilful misconduct of the company's servants," it is necessary to give affirmative evidence of such misconduct; it cannot be inferred.⁶ It would be wilful misconduct if the goods were put in a car not proper for the conveyance of the goods,⁷ or if it is brought to the notice of the company's servant that he is doing or omitting to do something which may seriously endanger the goods, and he persists in doing that which he has been

or damage to the goods during their transportation, whereby any legal liability should be incurred by the carrier, a railroad corporation, it should have the benefit of any insurance upon the goods. The goods were lost by fire; they were insured, and the insurance company paid the full amount of the loss to the owners, taking an assignment of their claim against the carrier. In an action thereon, it was held, that by the stipulation and payment of insurance the defendant was discharged from all liability. See also *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324.

¹ *Gill v. Manchester, &c. Ry. Co.*, L. R. 8 Q. B. 186. The contract of exemption is always to be construed most strongly against the carrier. *Mitchell v. Lanca-*

shire, &c. Ry. Co., L. R. 10 Q. B. 256; *Jennings v. Grand Trunk R. Co.*, 121 N. Y. 438.

² *Rooth v. Northeastern Ry. Co.*, L. R. 2 Exch. 173.

³ *Phillips v. Clark*, 2 C. B. n. s. 156.

⁴ *Robinson v. Great Western Ry. Co.*, 35 L. J. C. P. 127; *D'Arc v. London, &c. Ry. Co.*, L. R. 9 C. P. 325.

⁵ *Harris v. Midland Ry. Co.*, 25 W. R. 63.

⁶ *Lewis v. Gt. Western Ry. Co.*, 3 Q. B. D. 45; *Gt. Western Ry. Co. v. Glenister*, 22 W. R. 72; *Webb v. Gt. Western Ry. Co.*, 26 W. R. 111; *Haynes v. Gt. Western Ry. Co.*, 41 L. T. n. s. 436.

⁷ *Lewis v. Gt. Western Ry. Co.*, 3 Q. B. D. 45.

warned not to do. So, where the company's servants intentionally deliver to the wrong person.¹

SEC. 426. Duty to Receive Goods. — A railway company, like any other common carrier, is bound to receive from all persons, and carry all such goods as it professes to carry which are tendered to it for conveyance on its usual route, and for which the freight charges are offered, treating all persons alike, *cæteris paribus*, upon the same terms and at like rates,² and is liable to an action for refusing to receive and carry. The duty to afford facilities for carriage extends to the carriage of goods for other carriers.³ But it is not bound to receive goods which it does not profess to carry,⁴ nor to carry except upon usual trains,⁵ nor unless the goods are delivered in season for loading upon such usual trains.⁶ Nor is it bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk;⁷ nor dangerous articles, as nitro-glycerine, dynamite, gunpowder, aqua-fortis, oil of vitriol, matches, etc.⁸

SEC. 427. Delivery to the Company. — The liability of a railway company as a carrier attaches when the goods are delivered to it for carriage, and, except where it collects the goods, they are not received by it until they are delivered at its usual place of receiving goods, to some person authorized to receive them.⁹ Merely leaving

¹ Hoare v. Gt. Western Ry. Co., 25 W. R. 631. But improper packing, where it was not shown that the packers knew they were packing them in a manner likely to damage the goods, but they simply did not take the trouble to inform themselves whether or not damage would result from the packing, Lewis v. Gt. Western Ry. Co., 3 Q. B. D. 45; negligence in allowing cattle to stray on the line after they were unloaded, Gt. Western Ry. Co. v. Glenister, 22 W. R. 72; loading goods on a car too high to pass under the bridges of another railway company, by reason of which the car was delayed while repairs were being made to enable it so to pass, Webb v. Gt. Western Ry. Co., 26 W. R. 111; and placing horse-rakes on a truck shorter than themselves, it not being proved that this was in itself the cause of injury, Haynes v. Gt. Western Ry. Co., 41 L. T. N. s. 436, — have been held not to amount to "wilful misconduct." Rebban on Ry. Carriers, pp. 122-130.

² Cranch v. London, &c. Ry. Co., 14 C. B. 225; Garton v. Exeter, &c. Ry. Co., 1 B. & S. 112.

³ See *ante*, § 204.

⁴ McManus v. Lancashire, &c. Ry. Co., 4 H. & N. 327.

⁵ Donahoe v. London, &c. Ry. Co., 15 W. R. 772.

⁶ Palmer v. London, &c. Ry. Co., L. R. 1 C. P. 588; Garton v. Bristol, &c. Ry. Co., 1 B. & S. 112; Lane v. Cotton, 1 Ld. Rayd. 652.

⁷ Munster v. Southeastern Ry. Co., 4 C. B. N. s. 676; Hart v. Baxendale, 16 L. T. N. s. 396.

⁸ See Boston, &c. R. Co. v. Shidley, 107 Mass. 568.

⁹ Bergheim v. Gt. Eastern Ry. Co., L. R. 3 C. P. Div. 22; Evershed v. London, &c. Ry. Co., L. R. 3 Q. B. D. 134; Selway v. Holloway, 1 Ld. Rayd. 46; Grosvenor v. N. Y. Central R. Co., 39 N. Y. 34; Little Rock, &c. R. Co. v. Hunter, 42 Ark. 200. Thus where cotton is in the compress ware-

the goods at the station, without the acquiescence or knowledge of some person authorized to act for it, does not constitute a delivery,¹ nor even placing them upon one of the company's cars.² It is not necessary, however, in order to constitute a delivery, that a receipt should be given for the goods, or that they should be entered on a way-bill.³ If any servant authorized by the company, expressly or impliedly, to receive goods for shipment acquiesces in their being left at the station, this constitutes a delivery to the company.⁴ When the goods are received by the carrier, without any stipulation as to risk or rate of carriage, a mere ordinary contract for carriage is entered into, and the common-law liability applies to the carrier; but if the company attaches any special condition to the receipt of the goods, a special contract is created, and in that case it must be sued upon the special contract, and not as common carrier.⁵ If the contract is in writing, it must be proved and put into the case.⁶

SEC. 428. Right to demand Advance Freight. — A railway company, as well as any other common carrier, has a right to demand that its charges for transporting goods shall be paid in advance;⁷ and it is not obliged to receive goods for transportation unless such

house awaiting a supply of cars which the railroad company have contracted to furnish, the company having given no bill of lading, nor taken actual or constructive possession of the cotton, cannot be held liable as a carrier for its loss, although it had not furnished cars for its transportation as rapidly as it had agreed to do. *St. Louis, &c. R. Co. v. Insurance Co.*, 189 U. S. 223. See also *Wilson v. Atlanta, &c. R. Co.*, 82 Ga. 386; *Frazier v. Kansas City, &c. R. Co.*, 48 Iowa, 571.

¹ *Selway v. Hollaway*, 1 Ld. Rayd. 46.

² *Lovett v. Hobbs*, 2 Shaw, 127; *Leigh v. Smith*, 1 C. & P. 640.

³ *Chitty and Temple on Carriers*, 30.

⁴ *Winkfield v. Packington*, 2 C. & P. 599; *Long v. Horne*, 1 C. & P. 610; *Taff Vale Ry. Co. v. Giles*, 2 E. & B. 823; *Rogers v. Long Island R. Co.*, 2 Lans. (N. Y.) 269. Thus, where cattle have been placed in the company's yards for immediate shipment over its road, and part of them have already been put on the cars, they are in the possession of the company so as to make it liable as a common carrier and not as a warehouseman merely. *Gulf, &c. R. Co. v. Trawick (Tex.)*, 15 S. W. Rep. 568. But if the goods are received to be shipped according to future orders,

the carrier is only a warehouseman until the order to ship is given. *Wade v. Wheeler*, 3 Lans. (N. Y.) 201. And delivery to an agent of the carrier not authorized to receive them, does not constitute a delivery to the carrier unless a ratification of the agent's act is proven. *Trowbridge v. Chapin*, 23 Conn. 595; *Ford v. Mitchell*, 21 Ind. 54; *Leigh v. Smith*, 1 C. & P. 138. But where the agent at the station has apparent authority to receive baggage, — that is, when his acts and conduct at the station are such as to induce the belief that he is an authorized agent for such purposes, — a delivery to him may be held delivery to the carrier. *Ouimit v. Henshaw*, 35 Vt. 605; *Harrell v. Wilmington, &c. R. Co.*, 106 N. C. 258.

⁵ *White v. Gt. Western Ry. Co.*, 2 C. B. N. s. 7; *Harris v. Midland Ry. Co.*, 25 W. R. 63.

⁶ *Robinson v. Gt. Western Ry. Co.*, 35 L. J. C. P. 123.

⁷ *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372; *Barnes v. Marshall*, 18 Q. B. 785. The carrier has a lien on the goods for the amount of duty paid on them by it at the port of importation. *Louisville, &c. R. Co. v. Oden*, 80 Ala. 38.

charges are paid, *if demanded*.¹ But as the general custom is to receive and collect for carriage upon delivery to the consignee, unless advance freight is demanded when the goods are tendered for carriage this right is waived, and it can only rely upon its lien upon the goods for payment, or upon the responsibility of the consignee after delivery.² Where goods are accepted for carriage without requiring the charges to be paid in advance, the company is treated as waiving the right to pre-payment, and can only recover when the goods are delivered. But it has a lien upon the goods for its charges for carriage,³ or it may deliver the goods and sue for its charges.⁴ If, without the fault of the carrier, or by any of the excepted casualties, the goods are lost, the company is still entitled to recover its charges for carriage, unless the agreement is for payment when

¹ Wyld v. Pickford, 8 M. & W. 448; Botson v. Donovan, 4 B. & Ald. 28.

² Barnes v. Marshall, 18 Q. B. 785.

³ Wilson v. Gd. Trunk R. R. Co., 56 Me. 60; Rucker v. Donovan, 18 Kan. 281; Langworthy v. N. Y., & C. R. R. Co., 2 E. D. S. (N. Y. C. P.) 195; Barker v. Hanens, 17 John. (N. Y.) 234; Bowman v. Hilton, 11 Ohio, 303; Hunt v. Haskell, 24 Me. 339; Sullivan v. Park, 33 Me. 438. And this lien must be satisfied before they can be taken out of its possession, either by the consignor who stops them *in transitu* or an officer who attaches them upon *mesne* process or execution. Chandler v. Belden, 18 John. (N. Y.) 167; Raymond v. Tyron, 17 How. (U. S.) 53. If part are delivered, the lien remains upon the balance. Lane v. Old Colony R. R. Co., 14 Gray (Mass.), 143; Fuller v. Bradly, 25 Penn. St. 120; Briggs v. Martin, 13 B. Mon. 239. This right of lien exists although they were delivered to it by a wrongful owner, and are claimed by the rightful owner. Yorke v. Grenaugh, 2 Ld. Raym. 867. The common-law right is a specific lien; that is, a right to detain for the carriage of the particular goods, and not for those goods and any other balance the owner may owe for the carriage of other goods. Butler v. Woolcott, 2 B. & P. 64. The latter right, called a general lien, can only be supported by proof of general usage, special agreement, or mode of dealing, supporting such a claim. Rushforth v. Hadfield, 6 East, 519; 7 id. 224;

Wright v. Snell, 5 B. & Ald. 350. And the fact that a carrier has a right of general lien against a consignor does not entitle him as against the consignee to retain the goods in respect of a general balance due from the consignor. Butler v. Woolcott, *ante*. Nor can a general lien as against the consignee affect the right of the consignor to stop the goods *in transitu*, and claim their return upon paying the specific claim for carriage. Oppenheim v. Russell, 3 B. & P. 42; Jackson v. Nichol, 7 Scott, 577; and see notes to Chase v. Westmore, Tu. L. C., Merc. L. 690, *et seq.* A right of lien is defeated by giving up possession of the goods; or by dealing with them in such a manner as to amount to a conversion of them; and if once waived it cannot afterwards be resumed. Kruger v. Wilcox, Tu. L. C., Merc. L. 676. But if possession was obtained by fraud, it seems the carrier's lien would revive on regaining possession of the goods. Wallace v. Woodgate, Ry. & M. 194. A right of lien confers no right of sale upon the person holding such lien, though the retention of the chattels may be attended with expense. Thames Ironworks Co. v. Patent Derrick Co., 1 J. & H. 93. A demand for the sum actually due for tolls is a condition precedent to the right to sell. Field v. Newport, & C. Ry. Co., 3 H. & N. 409; North v. London, & C. Ry. Co., 14 C. B. N. S. 132.

⁴ Bastard v. Bastard, 2 Shaw, 81.

the goods have been transported to their destination ; in which case, a recovery can only be had for such as finally reach their destination.¹

SEC. 429. Duty of Company to Carry Safely.—The first duty of a carrier is to carry safely.² Therefore it is the duty of a railway company during the transit to use all the diligence and care towards the goods entrusted to it that prudent and cautious men in the like business usually employ for the safety and preservation of the property confided to their charge.³ For this purpose it must have its stations and yards in a safe condition, so that those who use them by the company's invitation may do so without injury to themselves or the traffic they bring or remove.⁴ It must provide proper cars and vehicles for the transportation, with all reasonable equipments and servants to take care of them.⁵ It must have its through communications so arranged as not to cause undue delay, its permanent way in such a state as not, by shaking, to make the chafing or wear and tear of the goods unduly severe, and it must have proper coverings to protect the goods from damage by exposure.

SEC. 430. Proper Carriages to be Provided.—A railway company is bound to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry ;⁶ and it will be liable for injury from the defects of a car, even if it belongs to another company, if it adopts it for the purposes of its own transit.⁷ But it is sufficient if the company provides a carriage which, without extraordinary accident, will probably perform the journey.⁸

SEC. 431. Goods Injurious to Each Other not to be Stowed Together.—It must take care not to forward in the same car goods

¹ Abbott on Shipping, 409, *et seq* ; Dig. 14, 2, 10. See *Andrew v. Moorhouse*, 5 Taunt. 435 ; 1 Marsh. 122 ; *Osgood v. Groning*, 2 Camp. 466 ; *Cook v. Jennings*, 7 T. R. 381 ; *Mashiter v. Buller*, 1 Camp. 81 ; s. p. *Clark v. Drusina*, 1 Marsh. 123 ; *Blakeley v. Dixon*, 2 B. & P. 821 ; *Cargo ex Galam*, 2 Moore, P. C. C. N. s. 216 ; 33 L. J. Adm. 97 ; *Vlierboom v. Chapman*, 13 M. & W. 230 ; *Hunter v. Prinsep*, 10 East, 378 ; *Swett v. Black*, 2 Sprague (U. S. C. C.), 49 ; *The Excelsior*, 2 Ben. (U. S. C. C.) 434 ; *Seers v. Linseed*, 1 Cliff. (U. S. C. C.) 68 ; *Donahoe v. Kettell*, 1 Cliff. (U. S. C. C.) 135 ; *Hart v. Shaw*, 1 Cliff. (U. S. C. C.) 358 ; *Fox v. Nott*, 6 H. & N. 630. See also *Shepherd v. De Bernales*, 13 East, 567 ; *Penrose v.*

Wilks, Abbott on Shipping, 415 ; *Tapley v. Martin*, 8 T. R. 445 ; *Christie v. Rowe*, 1 Taunt. 300.

² *Great Northern Ry. Co. v. Taylor*, L. R. 1 O. P. 385.

³ *Beal v. South Devon Ry. Co.*, 3 H. & C. 337.

⁴ *Booth v. North-Eastern Ry. Co.*, 36 L. J. Ex. 83.

⁵ *Beckford v. Crutwell*, 5 C. & P. 242.

⁶ *Lyon v. Mella*, 5 East, 428 ; *Shaw v. York, & Ry. Co.*, 13 Q. B. 847.

⁷ *Combe v. London, & Ry. Co.*, 31 L. T. N. s. 613.

⁸ *Amies v. Stevens*, 1 Str. 128 ; *Great Western Ry. Co. v. Blower*, 41 L. J. C. P. 268 ; L. R. 7 C. P. 655, *per Willes, J.*

which from their proximity would be likely to damage each other: thus, they would be liable for injury to flour caused by the effluvium of spirits of turpentine, or for damage to cambric goods caused by sulphuric acid if stowed near together.¹ So it is assumed if goods were placed in a car and injured by the effluvium of goods previously carried in the same car. If goods are of a class likely to be injured by coming in contact with other goods, the fact should be communicated to the company, otherwise they will not be liable.² The company must use the ordinary precautions to lessen as much as possible the ordinary wear and tear of goods, — as, if a cask containing any species of liquid leaks on the journey, it must take steps to stop the leak when it comes to their knowledge, — otherwise they will be liable for the loss;³ and though not liable for ordinary deterioration of goods in quantity or quality from inherent infirmity, yet if the goods require airing or ventilation during the journey, for the purposes of preservation, as fruits and other such articles sometimes do, they must do what is reasonably within their power for this purpose;⁴ and in the case of animals on a long journey, it may be necessary to feed them.⁵

SEC. 432. The Directions of the Owner must be Obeyed.—It must obey the directions of the owner of the goods during the transit; and a person who delivers goods to a railway company to carry, directed to a particular place, may countermand the direction at any moment of the transit and demand back his goods, at least on payment of the carriage, unless perhaps where the unpacking and delivering would be productive of much inconvenience.⁶

SEC. 433. When the Right to Stop in Transitu Exists.—If the seller has dispatched goods on credit to the buyer, and before they reach their destination the buyer becomes insolvent, the law, in order to prevent the loss that would happen to the seller, allows him in many cases to countermand the delivery before the arrival of the goods at their place of destination and to cause them to be re-delivered to himself.⁷ This right exists only *where the goods are sold on credit, and the consignee is insolvent, and the goods are still in transit*.⁸ If the goods have gone into the possession, actual or con-

¹ *Alston v. Herring*, 11 Ex. 822.

² *Hutchinson v. Guion*, 5 B. C. N. s. 149.

³ *Beck v. Evans*, 16 East, 244.

⁴ *Davidson v. Gwynne*, 12 East, 381.

⁵ *Taff Vale Ry. Co. v. Giles*, 23 L. J.

Q. B. 43; *Great Northern Ry. Co. v. Swaffield*, L. R. 9 Ex. 132.

⁶ *Scotthorn v. South Staffordshire Ry. Co.*, 8 Ex. 341.

⁷ *Lickbarrow v. Mason*, 1 Smith's L. C. 699 (Eng. ed.).

⁸ *Story on Bailment*, § 581; *Winslow v. Vt. Central R. R. Co.*, 42 Vt. 700; *Hedges v. Hudson River R. R. Co.*, 6 Robt.

structive, of the consignee, the right is terminated.¹ The right is confined to the unpaid vendor² or his factor or agent, who virtually stands in that relation to the goods.³ But a mere surety for the goods,⁴ or one who claims a lien on them for money or labor expended thereon, has no such right.⁵ The right is not lost by a part payment of the purchase money,⁶ or an acceptance of the consignee for a part or all of the purchase money.⁷ A sale of the goods by the consignee while they are in transit does not defeat the right.⁸

SEC. 434. Termination of the Transit.—The question as to whether the transit is ended is one depending on the peculiar facts in each case.⁹ It is of the very essence of the doctrine of stoppage *in transitu* that the goods should be in the custody of some third person intermediate between the seller and the buyer.¹⁰ The transit is always terminated by delivery to the vendee or consignee, but the question remains what constitutes such a delivery?

SEC. 435. What is Actual Delivery.—The actual delivery of the goods to the vendee or his agent, which puts an end to the *transitus*, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods, or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself; or it may be by the vendee's taking possession, by himself or agent, at some point short of the original intended place of destination.¹¹ If the vendee take them out of the possession of the carrier into his own before their arrival at their destination, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end;¹² though, in the case of the

(N. Y.) 119; *Solomon v. Philadelphia, &c. Co.*, 2 Daly (N. Y.), 104.

¹ *Mills v. Ball*, 2 B. & P. 461; *Whitehead v. Anderson*, 9 M. & W. 518; *Foster v. Frampton*, 6 B. & C. 107; *Oppenheim v. Russell*, 3 B. & P. 54; *Blum v. Marks*, 21 La. An. 458; *Howe v. Stewart*, 40 Vt. 145; *Wenger v. Bernhardt*, 55 Penn. St. 300; *Thompson v. Baltimore, &c. R. Co.*, 28 Md. 396; *Schmertz v. Dwyer*, 53 Penn. St. 335.

² *Kinloch v. Craig*, 3 T. R. 783.

³ *Feise v. Wray*, 3 East, 93; *Van Casleet v. Booker*, 18 L. J. Exch. 17; *Newson v. Thornton*, 6 East, 17.

⁴ *Siffken v. Wray*, 6 East, 371.

⁵ *Street v. Pym*, 1 East, 4.

⁶ *Hodgson v. Say*, 7 T. R. 446.

⁷ *Edwards v. Brewer*, 2 M. W. 375; *Kinloch v. Craig*, 3 T. R. 783.

⁸ *Ex parte Cooper*, L. R. 11 Ch. Div. 68.

⁹ In *Schotmans v. Lancashire, &c. Ry. Co.*, L. R. 2 Ch. App. 332, the court also held that the right of stoppage *in transitu* might be enforced by bill in equity.

¹⁰ See *Gibson v. Carruthers*, 8 M. & W. 328; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Bernardston v. Strong*, L. R. 3 Ch. App. 588.

¹¹ *James v. Griffin*, 2 M. & W. 633.

¹² *Bird v. Brown*, 4 Exch. 786; *Whitehead v. Anderson*, 9 M. & W. 518; *London, &c. Ry. Co. v. Bartlett*, 7 H. & N. 400; *Reynolds v. Boston, &c. R. Co.*, 43 N. H. 580.

absence of the carrier's consent, it may be a wrong to him for which he would have a right of action.¹

SEC. 436. Carrier may be Agent to Receive and Determine the Transitus. — A carrier may be the agent of the purchaser, and by changing his character from carrier to such agent may determine the *transitus*; and the most difficult cases are those where, the actual journey being over, the goods still remain under the control of the carrier in his warehouse. Then the question becomes, does he hold them as carrier, or as warehouseman and agent for the consignee? This depends upon the intention of the carrier and consignee, and whether or not they have, expressly or by implication, entered into a new contract, distinct from the original contract for carriage, that the carrier is to hold them for the consignee as his agent, for the purpose of custody on his account, and subject to some new or further order to be given by him.²

If there is any doubt whether the consignee has converted the carrier into his agent for custody, or for a new purpose other than carriage, the intention of the parties must be gathered from their various acts. The carrier cannot, without the consent of the consignee, convert himself into a warehouseman for the consignee, so as to terminate the *transitus*.³ Neither would any act of constructive taking possession by the consignee, short of actual removal out of the possession of the carrier, unless accompanied with circumstances to denote that the carrier assented to hold them for the consignee, in the nature of an agent for custody, determine the *transitus*.⁴ A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at is not enough to bring them into the possession, actual or constructive, of the purchaser.⁵ If the purchaser, having no warehouse of his own, is in the habit of using the warehouse of his carrier as his own, and making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end when the goods arrive at the customary place of deposit, although they may immediately afterwards receive a fresh destination.⁶

¹ Whitehead v. Anderson, 9 M. & W. 534.

² Wentworth v. Outhwaite, 10 M. & W. 450.

³ Bolton v. Lancashire, &c. Ry. Co., L. R. 1 C. P. 431; *Ex parte* Barrow, *Re* Worsdell, 25 W. R. 466; James v. Griffin, 2 M. & W. 623.

⁴ Whitehead v. Anderson, 9 M. & W. 535.

⁵ Coventry v. Gladstone, L. R. 6 Eq. 44.

⁶ Scott v. Pettit, 3 B. & P. 469; Rowe v. Pickford, 8 Taunt. 83; Allan v. Gripper, 2 Cr. & J. 218; Foster v. Frampton, 6 B. & C. 107.

SEC. 437. Delivery of Part, when Delivery of the Whole.— Different opinions have been held on the question of whether a part delivery is a constructive delivery of the entire goods comprised in the contract, so as to put an end to the right to stop *in transitu* as to the whole of the goods. At one time it was held that there was a constructive delivery of the whole. This, however, has since been questioned and dissented from, and it has been said only to be a constructive delivery of the whole where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole.¹

SEC. 438. Transit once Ended, Right cannot Revive.— If the transit be once at an end it cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and ulterior destination.²

SEC. 439. Notice must be given in Due Time to be Effective.— A company are entitled to express notice from a consignor before they will be liable for not stopping goods *in transitu*. To make such a notice effective it must be given at such a time, and under such circumstances, that the company may by the exercise of reasonable diligence communicate it to their servants in time to prevent the delivery of the goods to the consignee.³ Notice by the vendor or his particular agent or by his general agent, if the act of the agent is afterwards recognized and confirmed by the principal, will be sufficient to stop the goods.⁴ But notice by an unauthorized person will not be effectual unless ratified by the vendor within the time when he might himself have exercised the right.⁵ Where goods are stopped *in transitu*, the carrier is of course entitled to demand and have his hire for the carriage of such goods before giving them up. He cannot, however, as we have previously seen, claim to retain them as a lien for a general balance due from the consignee.

SEC. 440. Rival Claimants.— Sometimes a railway company is placed in an awkward position by claims upon the goods by persons other than and adverse to the party who delivered them. For instance, they may be followed and claimed by the sender's land-

¹ Bolton v. Lancashire & Yorkshire Ry. Co., L. R. 1 C. P. 431; *Ex parte* Cooper, *Re M'Laren*, L. R. 11 Ch. D. 68; *Ex parte* Gibbes, *Re Whitworth*, L. R. 1 Ch. D. 101.

² Valpy v. Gibson, 4 C. B. 337.

³ Whitehead v. Anderson, 9 M. & W. 518.

⁴ Northey v. Field, 2 Esp. 613; Bailey v. Culverwell, 8 B. & C. 448.

⁵ Bird v. Brown, 4 Exchq. 786.

lord for rent, or by a sheriff's officer under a writ of execution ; or the consignor may have stolen the goods, and they may be claimed by the person from whom they were stolen ; or the consignor may have become bankrupt, and the goods may be claimed by his trustee as fraudulently removed.

Ordinarily, the person who delivers the goods to the company is to be treated by them as the owner, and in general his title may not be disputed by the company, or a *jus tertii* or adverse title be set up, but the goods must be delivered according to his directions, without putting him to proof of his title.¹ That applies, however, only where such adverse claim is not asserted by the superior claimant to the sender, but merely by the carrier's own motion. But should the goods be the property of a third person, who is also entitled to the possession of them, and while in the custody of the company such owner should demand possession, they would be justified in delivering the goods to him.² Nor are they precluded by reason of having received goods from a particular individual from setting up the title of a third party, really entitled thereto, who has claimed and received the goods.³ In the case last cited the court said : " The defendants were common carriers ; and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question ; it was raised by the demand of the real owner before the defendants had parted with the goods. The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods ; in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample grounds for so holding." Still, the company have upon them the burden and risk of ascertaining who is the real owner, which, in the complication of mercantile transactions, is not always an easy task. Where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril ; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods.⁴ But a company may compel rival claimants to establish their title by interpleader.

¹ *Laelouch v. Towle*, 3 Esp. 115.

³ *Sheridan v. New Quay Co.*, 4 C. B.

² *Taylor v. Plumer*, 3 M. & S. 562.

N. S. 618.

⁴ *Story on Bailments* § 582.

SEC. 441. Common Carriers' Liability only Determined by a Delivery. — A common carrier engages not only safely to carry, but he also engages to carry with reasonable dispatch and safely to deliver the goods to the consignee.¹ It is immaterial whether there is

¹ *Bodenham v. Bennett*, 4 Price, 31; *Duff v. Budd*, 3 B. & B. 177. The uniform course of business between the defendant and certain despatch companies contracting to carry cotton from Memphis to Jersey City, to be there shipped for Liverpool, was for the defendant, on arrival of the cotton, to give notice thereof to the companies' agent in New York, named in the way-bill as consignee, whose duty it then was to obtain a permit from the steamship company for delivery thereto, and to deliver the permit to the defendant, on receipt of which the defendant would deliver the cotton on lighters to the proper vessel. On arrival of the lot in question, the defendant gave prompt notice to the proper agent, and vainly urged him to obtain the permit. It was held that the defendant was not liable for the delay in delivery. *Whitworth v. Erie R. R. Co.*, 87 N. Y. 413. By a contract with a steamship company, one was entitled to ship meat from New York to Liverpool in a space assigned to him, and in which he had constructed a refrigerator. He sent an agent to take care of the meat. He shipped under the contract a quantity of beef and mutton, but the mutton was omitted from the bill of lading. It was held that such omission did not relieve the company from liability; which was substantially that of a common carrier. A provision in such bill of lading exonerating the company from such loss as might result from the decay of the meat was held to refer only to its tendency in and of itself to decay; and not to relieve from loss occasioned by its own negligence or misconduct. In his action to recover for the loss of such meat, it appeared that he furnished ice enough to preserve the meat five days longer than the eleven usually required for the voyage; that two days after sailing, when the steamer was 490 miles from New York and 200 from Halifax, and the wind favorable for her return, the propeller-shaft broke; that the captain knew it would take at least twenty-two

days to complete the voyage by sail; that the agent informed him the meat could not be preserved for that time; that fearing the danger of the coast, he proceeded under sail and arrived at Liverpool in thirty-six days. It was held: 1. That the jury were properly instructed that if they were satisfied that the captain was thoughtless or reckless in endeavoring to continue the voyage, the plaintiff was entitled to recover, and a verdict for him would not be disturbed. 2. That he could recover for meat taken for the ship's use as well as for that thrown overboard. 3. Also the amount of freight which he had been required to pay before the voyage began. 4. That the agent's statement to the captain as to the condition of the meat and the inability to preserve it for so long a time is admissible. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107. It is the duty of a railroad company, engaged as a common carrier, to transport freight without unnecessary delay. A delay of twenty-four hours at a station on the way is an unnecessary one unless excused. That the company needed its rolling-stock for the purpose of conveying passengers is not a sufficient excuse. *Ormsby v. Union Pacific R. R. Co.*, 2 McCrary (U. S. C. C.), 48. A railroad company must receive and carry for express companies the articles known as express matter, without discrimination in favor of itself or any other express company. The rule is that if the railroad company engages in the business of express carriage itself, it must do so on terms of perfect equality with all other express carriers. *Southern Express Co. v. Memphis, &c. R. R. Co.*, 2 McCrary (U. S. C. C.), 570. In a New York case a company contracted to transport on A.'s account 300 bales of cotton "on board steamer Minnesota or Nevada for Liverpool." The cotton did not arrive at New York from Mobile until Oct. 26, when the Minnesota had a full cargo accepted and ready for loading, she being advertised to sail Oct. 27. The cotton, being sent by

negligence or not: his warranty as an insurer is broken by non-delivery.¹ Accordingly, a railway company's extraordinary liability

the Nevada, arrived at Liverpool a week after the Minnesota. Meanwhile the price had fallen. It was held that there was no breach of contract, and that the company was not required to notify A., on the arrival at New York, that the cotton could not go on the Minnesota; and this, though the receipts purported to be "memorandum of cargo on board steamship Minnesota." *Fowler v. Liverpool & Great Western S. S. Co.*, 87 N. Y. 190. In a Maryland case, in a suit against a railroad company to recover damages for delay in forwarding cattle intended for Monday's cattle-market, — it was held, that, in order to charge defendant with the consequences of the delay, it must be shown that defendant had knowledge, or from the circumstances of the case might reasonably have inferred, that the cattle were intended for that day's market. *Philadelphia, Wilmington, &c. R. R. Co. v. Lehman*, 56 Md. 209. In *McGraw v. Baltimore & Ohio R. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696, potatoes were delivered at the depot of a railroad company on the 13th of February, to be shipped on the 14th; there was a daily train between the place of shipment and the destination, the distance between which places was about 100 miles; the weather was mild, and continued so on the 14th; the potatoes did not reach their destination until the 16th, when they were so frozen as to be worthless, the weather on the 15th and 16th having become cold. It was held that the company was liable in damages. A railroad company is not relieved of liability to the penalty of \$25 per day under a statute for delay in shipment of goods beyond five days after receipt of the same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. The court held that five full running days are intended by the act, including Sunday whenever it intervenes; and that the company would not incur the penalty until the full expiration of the sixth day after the receipt of

the goods. *Keeter v. Wilmington & Welton R. R. Co.*, 86 N. C. 346. Where, by a written contract between an express company and a railroad, the latter agreed to "receive, load and unload, deliver and way-bill" all freight sent by the former; and other railroads, forming a continuous line with the first, made similar agreements, each to be responsible for all loss or damage to the goods while in its possession; and the last road to deduct its charges and account to the preceding and so on to the first, — it was held that the different railroads did not become partners, and that each was liable only for its own negligence. *St. Louis Ins. Co. v. St. Louis, Vandalia, &c. R. R. Co.*, 104 U. S. 146. A shipping receipt in form "Received from . . . consigned to . . . for transportation to . . . This receipt can be exchanged for a through bill of lading," was held to render the defendant liable for the proper transportation of the goods even beyond the line of its own road, and until they were delivered to the consignee. *Myrick v. Michigan Central R. R. Co.*, 9 Biss. (U. S. C. C.) 44. In *Bills v. N. Y. Central R. R. Co.*, 11 N. Y. 5, in a suit to recover damages to plaintiff's cattle, delayed upon defendants' train by a flood which submerged the track, the court, upon a previous trial, held that, under the contract, defendants were not bound to unload the cattle when the train was stopped by the water; but that, upon reasonable request, their duty was to place the cars, if practicable, so as to enable plaintiff to unload his cattle, and that, for a failure to do so, they were liable. It appeared that plaintiff's agent made such a request; that the engine drawing the train was disabled, but that other engines might have been readily obtained; that defendants' conductor did not send for them. It was held that the question of negligence was properly for the jury; and that this was so, even if the jury might infer from the charge that it was negligence not to send forty-three miles for another engine. There was evidence tend-

¹ *Richards v. London, &c. Ry. Co.*, 7 C. B. 839.

as carriers is held to continue to the moment when their agents or servants deliver the goods, actually or constructively, to the consignee or his agent, or at the stipulated or authorized place of consignment,¹ or until delivery has been waived, or the goods have been tendered to and refused by the consignee.

SEC. 442. Care which must be used in the Delivery of the Goods.

—The care which a carrier must take in delivering goods depends upon their nature, and the circumstances of each case. It is his duty to deliver, as well as to carry,² and the delivery must be made at the place directed by the consignor, if upon the carrier's route, and to a connecting carrier, if not upon the route of the carrier receiving the goods. In the case of railways and vessels, they are only bound to deliver at their wharves or warehouses; and after having given the consignee notice of the arrival of the goods, and a reasonable time in which to take them away, they cease to stand in the relation of carriers to, and are only liable as warehousemen for the goods.³ If the goods arrive upon Sunday or a legal holiday, the consignee is not bound to take them away upon that day, but is entitled to a reasonable time after;⁴ but if he begins to take them away *before* such day, but leaves the balance until *after*, the carrier is not liable for their destruction by fire except upon the ground of negligence.⁵

SEC. 443. When Carrier's Responsibility ceases, Question for Jury.

—Whenever delivery has taken place, the responsibility of the car-

ing to show negligence on the part of defendants' servants in disabling the train, and it was held that the jury were properly instructed that if the train was disabled by such negligence, then their refusal to place the cars where plaintiff could unload was not to be excused by a want of motive power. Also that the plaintiff's damages could not be mitigated by speculating upon what might have happened had his request been granted, and the cattle unloaded. Before the train reached the water, those on board were warned. Plaintiff's agent then requested that the cars should be so placed that he could unload. His request was refused. It was held that defendants were not liable because of such refusal if their conductor had reason to believe that he could run through without serious detention.

¹ *Fowles v. Great Western Ry. Co.*, 7

Ex. 699; *Moffat v. Gt. Western Ry. Co.*, 15 L. T. N. S. 630. See *post*, § 452 c.

² *Parker v. Flagg*, 26 Me. 181; *Schenk v. Phila. Steam Propeller Co.*, 60 Penn. St. 109; *Eagle v. White*, 6 Wheat. (Penn.) 505; *Erskine v. Thames*, 6 Miss. 371; *The Mary Washington*, 1 Abb. (U. S. C. C.) 1; *Lamb v. Camden, &c. R. R. Co.*, 2 Daly (N. Y. C. P.), 454; *Harris v. Rand*, 4 N. H. 259; *Ludwig v. Meyre*, 5 W. & S. (Penn.) 434.

³ *Alabama, &c. R. R. Co. v. Kidd*, 35 Ala. 209; *Sholes v. Ackerland*, 15 Ill. 474; *Gould v. Chapin*, 20 N. Y. 259; *Rowland v. Mills*, 2 Hilt. (N. Y. C. P.) 150; *Dean v. Vaccaro*, 2 Head (Tenn.), 288.

⁴ *Russell Mfg. Co. v. N. H. Steamboat Co.*, 50 N. Y. 121.

⁵ *Richardson v. Goddard*, 23 How. (U. S.) 28.

rier for the goods ceases; but he must deliver the goods as they were intended to be delivered. The address will be a sufficient guide as to the intention of the bailor,¹ and if the carrier delivers the parcel at a place to which it is not addressed, an action of trover lies against him.² But other circumstances must be considered before we can say definitely what will constitute a competent delivery, and in that way terminate the responsibility of the carrier. As might have been anticipated, this is, in many cases, a question rather for the jury than for the court.³

SEC. 444. Delivery within Reasonable Time.—Other duties with regard to delivery, however, devolve upon a carrier. The *place* is not only a matter of importance, but the *time* is an element of the contract. Goods are not delivered to a carrier that he may deliver them at his own pleasure, but that he may deliver them in such time as, looking at the length of his ordinary journey, the mode of the conveyance, and the circumstances of which the bailor might be cognizant before he intrusted his goods, shall be deemed reasonable.⁴ The question as to what will be considered a reasonable time is to be looked at in relation to all the circumstances of the case; the weather, the state of the roads, the season of the year, and other similar matters may be considered with a view to a satisfactory answer.⁵ Thus, where the defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time, — the obstruction having been caused solely by the negligence of another company, who had running-powers over their line, — the defendants were held not to be liable to the plaintiff for damage to his goods caused by the delay.⁶ While therefore, it is the carrier's duty to convey goods by means of the ordinary route, and without any unnecessary delay, both these duties may be obviated by the circumstances, and where either delay or deviation is necessary for the

¹ *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 676. See Add. on Con. 810.

² *Perkins v. Smith*, 1 Wils. 328; *Youl v. Harbottle, Peake*, N. P. C. 68; *Devereaux v. Barclay*, 2 B. & A. 702; *Stephens v. Elwall*, 4 M. & S. 259; and as distinguished from these, *Ross v. Johnson*, 5 Burr. 2825. See also *Bonney v. The Huntress*, 4 Hunt's Merch. Mag. 83; *The Ben Adams*, 2 Ben. (U. S. C. C.) 445; *Meyer v. Chicago, &c. R. R. Co.*, 24 Wis. 586.

³ See *Hedges v. Hudson River R. R. Co.*, 6 Robt. (N. Y.) 119.

⁴ *Hughes v. Great Western Ry. Co.*, 14 C. B. 637; *Raphael v. Pickford*, 5 M. & G. 553; *Davis v. Garrett*, 6 Bing. 725.

⁵ *Briddon v. Great Northern Ry. Co.*, 28 L. J. Exch. 51; *Broadwell v. Butler*, 6 McLean (U. S.), 296.

⁶ *Taylor v. Great Northern Ry. Co.*, 1 L. R. C. P. 385.

safety of the goods, it will be held to have been a part of the primary duty of the carrier.¹ It is the carrier's duty to deliver the goods to the consignee, upon his presenting himself in reasonable time and at a proper place to receive them. If the consignee does this, or until he has had an opportunity to do so, there seems to be no good ground for reducing the liability of the carrier to that of a warehouseman.² The rule may perhaps be better stated to be, that *the liability of a carrier as such, continues until the goods are ready to be delivered at their place of destination, and the consignee has had a reasonable opportunity, during the hours when such goods are usually delivered, in which to examine them so far as to judge of their outward appearance, and to remove them.*³ As to what constitutes a reasonable opportunity, it may be said that no reference is to be had to the peculiar circumstances of the consignee, but the question is whether he had an opportunity such as would give a person residing in the vicinity of the place of delivery and informed of the usual course of the business, and of the time when the goods are expected to arrive, suitable time *within the usual business hours* to take them away.⁴

In Massachusetts,⁵ however, it is held that the liability of the carrier, as such, ceases when the goods have reached their place of destination, and have been safely deposited upon the platform or in their

¹ Davis v. Garrett, 6 Bing. 725.

² Graves v. Hartford, &c. Steamboat Co., 38 Conn. 143; Gatcliffe v. Bourne, 4 Bing. 333.

³ Stenk v. Philadelphia Steam Propeller Co., 60 Penn. St. 109; The Mary Washington, 1 Abb. (U. S.) 1; Lamb v. Camden, &c. R. R. Co., 2 Daly (N. Y. C. P.), 454; Solomon v. Philadelphia Steamboat, &c. Co., 2 Daly (N. Y. C. P.), 104.

⁴ Moses v. Boston & Maine R. R. Co., 32 N. H. 523; Leavenworth, &c. R. R. Co. v. Maris, 16 Kan. 333; Blumenthal v. Brainard, 38 Vt. 402; Winslow v. Vt. &c. R. R. Co., 42 Vt. 700; Ouimit v. Henshaw, 35 Vt. 604; Porter v. R. R. Co., 20 Ill. 407; Alabama, &c. R. R. Co. v. Kidd, 35 Ala. 209; Chicago, &c. R. R. Co. v. Bensley, 69 Ill. 630; Wood v. Cracker, 18 Wis. 345; Lemke v. Chicago, &c. R. R. Co., 39 Wis. 449; Hirsch v. Quaker City, 2 Dis. (Ohio) 144; Morris, &c. R. R. Co. v. Ayres, 28 N. J. L. 393;

Maignan v. New Orleans, &c. R. R. Co., 24 La. An. 333. A common carrier has not performed his contract as carrier until he has delivered, or offered to deliver, the goods to the consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods, is a condition precedent to the right to warehouse them; and if a reasonable and diligent effort is not made, the carrier is liable for the consequences of the neglect. Zinn v. New Jersey Steamboat Co., 49 N. Y. 442; McAndrews v. Whellock, 52 N. Y. 40; Solomon v. Phila., &c. Steamboat Co., 2 Daly (N. Y. C. P.), 104.

⁵ Thomas v. Boston, &c. R. R. Co., 10 Met. (Mass.) 472; Norway Plains Co. v. Boston, &c. R. R. Co., 1 Gray (Mass.), 263; Stowe v. New York, &c. R. R. Co., 113 Mass. 521; Barron v. Eldredge, 100 Mass. 455.

warehouse, and that from that time, without notice to the consignee of their arrival, he is liable only as a warehouseman for their safe keeping; and this rule is adopted in North Carolina, Pennsylvania, Iowa, California, Indiana, Illinois, Alabama, and Georgia,¹ except that in the latter States the liability of the carrier is not changed to that of a warehouseman until the goods have been placed in the warehouse or other place of safe deposit. Where the consignee knows that the goods have arrived, and of their readiness for delivery, or is present when they arrived, the carrier is excused from giving notice; and if he neglects to take them away within a reasonable time, the carrier is absolved from liability therefor, as such.² If the carrier is ignorant of the whereabouts of the consignee, it is his duty to make due inquiry to ascertain it, and if, after due inquiry, he fails to ascertain the fact, he is excused from giving notice; and after a reasonable time for removal has elapsed, his liability as a carrier ceases, if he has stored the goods, and he is only liable as a warehouseman.³

Not only must delivery be made within a reasonable time, but also in a reasonable manner and at a proper place;⁴ and unless

¹ Neal v. Wilmington, &c. R. R. Co., 8 Jones (N. C.), L. 482; McCarty v. New York, &c. R. R. Co., 30 Penn. St. 247; Mohr v. Chicago, &c. R. R. Co., 40 Iowa, 579; Jackson v. Sacramento Valley R. R. Co., 23 Cal. 269; Chicago, &c. R. R. Co. v. McCool, 26 Ind. 140; Chicago, &c. R. R. Co. v. Scott, 42 Ill. 132; Alabama, &c. R. R. Co. v. Kidd, 35 Ala. 209; Southwestern, &c. R. R. Co. v. Felder, 46 Ga. 433.

² Fenner v. Buffalo, &c. R. R. Co., 44 N. Y. 505; Pelton v. Rensselaer, &c. R. R. Co., 54 N. Y. 214. In Pinney v. First Division St. Paul, &c. R. R. Co., 19 Minn. 251, the rule was stated to be that, "if the consignee is present on the arrival of the goods, he must take them without unreasonable delay. But if he is not present, but lives at the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them." See also, adopting the same rule, Buckley v. Great Western R. R. Co., 18 Mich. 121; Culbreath v. Phila. &c. R. R. Co., 3 Houst. (Del.) 392; Sprague v. N. Y. Central R. R. Co., 52 N. Y. 637. In Mississippi

it is held that where it is the custom of the company to give notice of the arrival of the freight, it is his duty to do so. New Orleans, &c. R. R. Co. v. Tyson, 46 Miss. 729.

³ Pelton v. Rensselaer, &c. R. R. Co., ante.

⁴ Goodwin v. Baltimore, &c. R. R. Co., 50 N. Y. 154. In this case, it was held that the duty of the carrier ceases by the landing of bulky articles upon a public wharf in the customary manner, with due notice to the consignee. If a carrier lands perishable articles upon a wharf upon an unsuitable day, without reasonable notice to the consignee, he is liable for the damages resulting. McAndrews v. Whellock, 52 N. Y. 40. See also, upon the general proposition in the text, Rowland v. Miln, 2 Hilt. (N. Y. C. P.) 150. The carrier is bound to provide a suitable place for delivery, and to provide suitable safeguards to prevent loss. Sunderland v. Westcott, 40 How. Pr. (N. Y.) 270; Cleveland, &c. R. R. Co. v. Sargent, 19 Ohio St. 438; Propeller Mohawk, 8 Wall. (U. S.) 153; Hill v. Humphreys, 5 W. & S. (Penn.) 123; Haslam v. Adams Express Co., 6

these requisites are complied with, the responsibility of the carrier, as such, continues.

SEC. 445. Misdelivery, Effect of. — If goods are misdelivered by a carrier, it is treated as a conversion of the goods by him.¹ Thus, where a common carrier, where the circumstances are such as should put him upon inquiry, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order directed to the fictitious firm, he is liable to the consignor for their value.² In a case where the defendants received goods for transportation, accompanied by a manifest containing the instructions: "Order A. B., & Co., notify C.," and they delivered the same to C., without the order of A. and B. who were the plaintiffs, it was held that the defendants were liable for the loss incurred by the plaintiffs by such delivery. The defendants might perhaps decline to receive such shipments, but after they receive them they must obey the written directions of the consignor.³

If a custom as to the place and manner of delivery of goods to a certain person has been established, the carrier is justified in pursuing that method; but if he deviates therefrom, and, as a result, the goods are lost, he is liable therefor.⁴ But where a usage as to delivering goods to a particular person is relied on, it must appear that the usage is strictly observed; and if an order of the consignee is relied upon, delivery under the order can only be effectual, when made according to its terms.⁵ If the carrier, when bound to make a personal delivery, as in the case of an express company, tenders or offers to make delivery to the consignee at a proper time and place for delivery, and the consignee declines, for a cause which does not involve any fault on the carrier's part, to accept delivery, the carrier from that time stands only in the relation of a warehouseman.⁶

Bosw. (N. Y.) 235. But the consignee may, by accepting the goods at another and different place from that to which they are consigned, discharge the carrier from liability. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215.

¹ *Clafin v. Boston, &c. R. Co.*, 7 Allen (Mass.), 341; *Viner v. N. Y. S. S. Co.*, 50 N. Y. 23.

² *Price v. Oswego, &c. R. Co.*, 50 N. Y. 213.

³ *Wright v. Northern Central R. Co.*, 8 Phil. (Penn.) 19; *Furman v. Un. Paci-*

fic R. Co., 106 N. Y. 579; *Ela v. American M. U. Exp. Co.*, 29 Wis. 611.

⁴ *So. Express Co. v. Everett*, 37 Ga. 688.

⁵ *Baldwin v. Am. Exp. Co.*, 23 Ill. 197; *Haslam v. Adams Exp. Co.*, 6 Bosw. (N. Y.) 235.

⁶ *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 97. Where the shipper takes the bill of lading in his own name he thereby retains title in himself, and the carrier cannot rightfully deliver the goods to any other person except on his order or a transfer of the bill of lading. *Young v. East Ala. R. Co.*, 80 Ala. 100.

SEC. 446. **Delivery to right person.**—The duty of the carrier is imperative to deliver to the right person, and no amount of care will excuse him for delivering to the wrong person;¹ neither fraud, imposition, nor mistake will excuse him from liability if he delivers to the wrong person.² If he does not know the consignee, he should require proof of his identity, which he may do when his requirements in that respect are not unreasonable, and whether they are or not is for the jury.³ In some of the States it is held that where goods are delivered to an impostor who has ordered them in a fictitious name, the company not having required identification, it is liable to the consignors therefor.⁴ Thus, in the Vermont case cited *supra*, in an action brought against a railroad company for the non-delivery of goods, it appeared that the goods were ordered from the plaintiffs by C., writing under the false name of R., and intending to swindle the plaintiffs. The plaintiffs addressed the goods to R., and forwarded them by defend-

¹ *Sanquer v. London, &c. Ry. Co.*, 16 C. B. 163; *McKean v. McIver*, L. R. 6 Exchq. 36; *Heugh v. London, &c. Ry. Co.*, L. R. 5 Exchq. 51; *Cork Distilleries Co. v. Gt. Southern, &c. Ry. Co.*, 5 Ir. Rep. C. L. 177; *Meyer v. Chicago, &c. R. R. Co.*, 24 Wis. 566; *Winslow v. Vt. &c. R. R. Co.*, 42 Vt. 700; *Stephenson v. Hart*, 4 Bing. 476; *Am. Exp. Co. v. Stack*, 29 Ind. 27; *Youl v. Harbottle, Peake*, 68; *Brown v. Hodgson*, 4 Taunt. 189.

² *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34. If the goods are delivered upon a forged order, the carrier is liable as for a conversion. *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Duff v. Budd*, 3 B. & B. 177; *Powell v. Myers*, 26 Wend. (N. Y.) 290; *Guillaume v. Packet Co.*, 42 N. Y. 212; *Devereaux v. Barclay*, 2 B. & Ald. 702. See also *Southern Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Stephenson v. Hart*, 4 Bing. 476; *Chapman v. New Orleans, &c. R. R. Co.*, 21 La. An. 224; *Ten Eyck v. Harris*, 47 Ill. 288; *McKean v. McIver*, L. R. 6 Exch. 36; *Meyer v. Chicago, &c. R. R. Co.*, 24 Wis. 566; 1 Am. Rep. 207; *Jones v. Earl*, 37 Cal. 630; *The Ben Adams*, 2 Ben. (U. S. C. C.) 445; *Jeffersonville R. R. Co. v. White*, 6 Bush (Ky.), 251; *Dunlap v. Hunting*, 2 Den. (N. Y.) 643; *Carroll v.*

Mix, 57 Barb. (N. Y.) 215; *Roberts v. Riley*, 15 La. An. 103; *Burrell v. North*, 2 C. & K. 680; *Bradley v. Waterhouse*, 3 C. & P. 318; *Packard v. Getman*, 4 Wend. (N. Y.) 615; *Michigan Central R. R. Co. v. Day*, 20 Ill. 375; *Ball v. Liney*, 48 N. Y. 6; *Wilson v. Vermont Central R. R. Co.*, 42 Vt. 200; 1 Am. Rep. 365; *American Merchants' Express Co. v. Milk*, 73 Ill. 224; *Dufour v. Murphy*, 37 Miss. 577; *Willard v. Bridge*, 41 Barb. (N. Y.) 361; *Dudley v. Hawley*, 40 Barb. (N. Y.) 397; *Dean v. Vaccaro*, 2 Head (Tenn.), 485; *Guillaume v. Hamburg Co.*, 42 Vt. 212; *Hempstead v. New York Central R. R. Co.*, 28 Barb. (N. Y.) 485; *Rogers v. Weir*, 34 N. Y. 463; *Ostrander v. Brown*, 15 Johns. (N. Y.) 40; *Tuttle v. Gladding*, 2 E. D. S. (N. Y. C. P.) 157.

³ *Watt v. Porter*, 2 Mas. (U. S.) 77; *Sargent v. Gile*, 8 N. H. 325; *Leighton v. Shapley*, 8 N. H. 359; *Dent v. Chiles*, 5 S. & P. (Ala.) 383; *Duff v. Budd*, *ante*; *Am. Exp. Co. v. Fletcher*, 25 Ind. 492; *So. Exp. Co. v. Van Meter*, 17 Fla. 783; 35 Am. Rep. 107; *Am. Exp. Co. v. Stack*, 29 Ind. 27. The fact that the goods are delivered on a forged order is no defence. *Gosling v. Higgins*, 1 Camp. 451; *Lubbock v. Inglis*, 1 Stark. 104.

⁴ *Winslow v. Vt. &c. R. R. Co.*, 42 Vt. 700.

ants' road. C. awaited their arrival, and claimed them under the name of R., which name he assumed for the purpose of getting them; and the defendants delivered them without requiring identification, or taking any other precaution to make sure that the person receiving them was R. It was held that they were liable for a misdelivery. They were chargeable with negligence. They should have required the claimant to identify himself as R., and on his failure to do so, should have held the goods for the consignors. The fact that the plaintiffs had been led by fraud to address the goods in a fictitious name did not operate to mislead the company, nor was the error in the name any reason why they should have delivered the goods without inquiry as to the identity of the person claiming them with the one named in the address. "What," say the court, "should be the effect upon the measure of the defendants' responsibility, of the plaintiff's error in directing the goods to a fictitious address? This might be an important question if the error had misled the defendants, and occasioned them to deliver the goods to the wrong party after they had used that care and precaution which would be reasonable in such matters. But this error in the direction could not excuse the defendants from the exercise of at least ordinary care in the delivery of the property. They did not exercise such care. They were guilty of actual negligence. They delivered the goods to an employé of a truckman upon his mere statement that Roberts sent for them; any other man in Boston could have obtained them just as easily. The swindler, Collins, was not known as Roberts, and if he had been required to identify himself as Roberts, might never have attempted it; and if he had, it would have been likely to have led to the detection of the fraud." Where the goods are actually delivered to the person who ordered them, the carrier is not excused if the goods were shipped in a fictitious name, and the person to whom they were delivered was not known by that name, and no reasonable inquiries were instituted by the carrier to ascertain the identity of the consignee as the person to whom they were addressed. The reason for this rule is that the carrier must use reasonable diligence in delivering the goods to the party to whom they are addressed, and if they are professedly addressed in a fictitious name, this circumstance of itself puts the carrier upon inquiry, and calls for the exercise by him of increased vigilance in ascertaining whether a person known by a different name is in fact entitled to them; because as stated in

the Vermont case before referred to, such inquiry and vigilance would be calculated to discover the fraud, if any; and if in fact there was no fraud, the parties cannot complain of any delay or inconvenience which their own acts have occasioned.¹ Not only is the carrier bound to deliver the goods to the consignee or owner, but he is also bound to deliver them *at the place* to which they are shipped; and if upon the faith of a forged order, he delivers them to a person other than the owner, *at another place, although to a person of the same name*, he is liable for the goods.²

The liability of the carrier as to delivery depends upon the question whether or not, in making the delivery to the wrong person, he acted with a proper degree of care and prudence in ascertaining the right of the person to whom the delivery was made, to have the goods, or was in that respect guilty of negligence; and there is a class of cases in England, and in some of the States of this country, where a rule apparently contrary to that adopted in the cases already cited is held.³ In some cases where the goods are sent to a person addressed in a fictitious name, and they are delivered to a person known to the carrier, who represents himself as the agent of such person, it is held that, inasmuch as they are delivered to the person for whom they were intended, the carrier is not liable.⁴ If the goods are ordered in a fictitious name, with an intent to defraud, and are directed to be sent to the address given at a certain street and number, and the goods are so sent, and the carrier takes such steps as he is required to take to deliver them there,

¹ Price v. Oswego & Syracuse R. R. Co., 50 N. Y. 213.

² Houston, &c. R. R. Co. v. Adams, 49 Tex. 748; 30 Am. Rep. 116.

³ In Western Union Telegraph Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1, an impostor at Cincinnati sent a despatch to Joseph Meyer, the plaintiff, at Selma, Alabama, in the name of Max Reis, requesting the plaintiff to send him a telegraphic money-order for forty dollars, immediately. The plaintiff received the despatch, and, supposing it to be from his nephew of that name, who was then on his way from New York to Selma, paid the money to the defendants, and received from them a receipt as follows: "Received from Joseph Meyer forty dollars to be paid to Max Reis at Cincinnati, Ohio." On the same day the defendant handed over

the money to the person who sent the despatch to the plaintiff, who was not known to the company's agent, or identified as a person whose name was Max Reis, and who, in fact, was an impostor, and not the plaintiff's nephew. The plaintiff had judgment in the court below, but upon appeal the judgment was set aside upon the ground that, as there were no suspicious circumstances to put the company upon further inquiry as to the identity of the impostor, the company could not be charged with negligence in that respect, and therefore were not liable for the money. But *contra*, see Elwood v. Western Union Tel. Co., 45 N. Y. 549; Norwalk Bank v. Adams Exp. Co., 4 Blatchf. (U. S. C. C.) 455.

⁴ Dunbar v. Boston & Providence R. R. Co., 110 Mass. 26.

he cannot be held chargeable as for a misdelivery, although there is no such person or firm doing business at that place.¹ But if the carrier delivers at the place indicated, or does what is equivalent to a delivery, he does all that he is bound to do. *He obeys the sender's orders, and is guilty of no wrong. To make him liable, there must be some fault.* It is a question of fact whether there has been any such negligence as makes him liable for the conversion of the goods; and where he has carried out the directions of the sender, the mere fact that he has delivered them to some person to whom the sender did not intend delivery to be made is not sufficient to support the allegation that he has converted them.²

It is important, in the decision of questions of this character, to ascertain whether, at the time of the alleged misdelivery, the defendant occupied the relation of carrier, or only that of a warehouseman to the goods; because, as is said in some of the cases, the carrier, as such, is under the same obligation or duty to *deliver* the goods safely that he is to carry them.³ It delivers property at its peril, and must take care that it is delivered to the right party; for if the delivery is to the wrong person, either by an innocent mistake or through the fraud of third persons, as upon a forged order, it will be responsible, and the wrongful delivery will be treated as a conversion.⁴ But if it holds the goods only as a warehouseman, the authorities are all agreed that it is only responsible where it fails to act with ordinary care and prudence in reference to the keeping or delivery of the goods.⁵ When this condition exists, the consignor, in order to charge the carrier with liability for the loss of the goods, must show that he has acted negligently in respect to the matter producing the loss; or perhaps it should be said that the carrier may show, to protect himself from liability, that his relation to the goods as carrier had ceased, and that the loss ensued without his fault or negligence.⁶ Whether a carrier who is bound to make a personal delivery has made reasonable inquiry to find the consignee, so that his liability as a carrier has ceased, depends upon the circumstances of each case; and in deter-

¹ McKean v. McIver, L. R. 6 Exch. 36.

² Heugh v. London, &c. Ry. Co., L. R. 5 Exch. 50.

³ Winslow v. Vt., &c. R. Co., 42 Vt. 700.

⁴ McEntee v. Steamboat Co., 45 N. Y. 34.

⁵ Witbeck v. Holland, 45 N. Y. 13.

⁶ Neal v. Wilmington R. Co., 8 Jones (N. C.) L. 482; Fenner v. Buffalo, &c. R. Co., 44 N. Y. 505; Fisk v. Newton, 1 Den. (N. Y.) 45; Weed v. Barney, 45 N. Y. 344; 6 Am. Rep. 97; Kremer v. Southern Exp. Co., 6 Coldw. (Tenn.) 356; Hudson v. Baxendale, 2 H. & N. 575.

mining this question it is competent to show whether or not the consignee was well known at the place to which the goods were consigned.¹

SEC. 447. **What constitutes a delivery.**—The company cannot claim that it has delivered the goods simply because the consignee is present to see them unloaded, or even assists in unloading them. It is bound to deliver them at a safe and convenient place, and there can be no determination of its liability as a carrier until it has done so. Thus, in an English case,² the consignee's servants were present, and assisted the company's servants in unloading some cattle consigned to the plaintiff. The cattle were unloaded at a siding where only one truck could be unloaded at a time. There was no yard to receive the cattle, and those which came out of the first truck had to stand in the station-yard while the others were being unloaded. While this was being done, some of them strayed upon the track and were killed by a passing engine; and it was held that there was no delivery of the cattle, because they had not been delivered in a safe and convenient place. If, however, cattle are taken out of the cars, and either the consignee or his servant is present to take possession of them, and they place them in a yard, although upon the company's premises, the liability of the company is at an end, and if they are afterwards injured without the fault of the defendant, the loss falls upon the consignee.³ If the consignee refuses to accept the goods,⁴ the company becomes a mere involuntary bailee thereof, and should retain them for a reasonable time. It seems that upon such refusal the company has no right to return the goods at once to the consignor.⁵ They should retain the goods if they have conveniences for so doing, and await advice from the consignor.

SEC. 448. **Delivery must be made within reasonable time.**—When goods are received for carriage without any special contract as to the time of delivery, they must be delivered within a reasonable time.⁶ This common-law obligation may, however, be superseded by a special contract to deliver within a certain time, and

¹ Witbeck v. Holland, 45 N. Y. 13.

⁵ Cranch v. Great Western Ry. Co., 3

² Rooth v. North-Eastern Ry. Co., L. R.

H. & N. 183.

2 Exchq. 173.

⁶ Raphael v. Pickford, 5 M. & G. 558;

³ Shepherd v. Bristol, &c. Ry. Co., L. R.

Donahoe v. London, &c. Ry. Co., 15

3 Exchq. 189.

W. R. 792.

⁴ Hough v. London, &c. Ry. Co., L. R.

5 Exchq. 51.

when such a contract is entered into, nothing will excuse the company's failure therefrom.¹ So, too, the company may by special contract supersede its common-law liability to deliver within a reasonable time,—as, where it provides that it shall not be held responsible for delivery within “any certain or definite time.”² The question as to what is a reasonable time depends upon the circumstances of each case, and is for the jury.³ As to what is the usual time for transit and delivery the courts will take judicial notice; but while the ordinary time for delivery is *prima facie*, it is not necessarily, equivalent to a reasonable time.⁴ Delay occasioned by the act of God,—as, by a freshet sweeping away a portion of its track,⁵ or a snow-storm which blocks up the road and renders a passage over it impossible, without extraordinary efforts and expense, will excuse delay.⁶ So, too, if a railway company is well equipped for its ordinary business, it cannot be held responsible for a delay occasioned by an extraordinary influx of business which it had no reason to anticipate, and for which it has had no opportunity to prepare.⁷ If the goods, in accordance with a general usage, or the directions of either the consignor or consignee, are retained in the company's warehouse, it ceases to be liable as a carrier therefor;⁸ and the same is true where goods are received to await future orders.⁹ It is not treated as a gratuitous bailee because it has the right to charge for storage after the lapse of a reasonable time, and until the lapse of such time the compensation for carriage is treated as including the expense of storage.¹⁰ A warehouseman is not an insurer of goods in his custody, but is only liable for negligence in respect to their custody. He is only bound to use such care as a reasonably prudent man would use in respect to the goods in question.¹¹ Consequently, if the goods are destroyed by an acci-

¹ *Donahoe v. London, &c. Ry. Co.*, ante; *Pickford v. Grand Junction Ry. Co.*, 12 M. & W. 766.

² *Hughes v. Great Western Ry. Co.*, 14 C. B. 637.

³ *Wren v. London, &c. Ry. Co.*, 1 L. T. N. S. 5; *Hales v. London, &c. Ry. Co.*, 4 B. & S. 66.

⁴ *Great Northern Ry. Co. v. Taylor*, L. R. 1 C. P. 385.

⁵ *Lipford v. Charlotte R. B. Co.*, 7 Rich. (S. C.) 409.

⁶ *Great Northern Ry. Co. v. Taylor*, ante.

⁷ *Wallace v. Great Southern, &c. Ry. Co.*, 17 W. R. 464; Angell on Carriers, 252.

⁸ *Garside v. Trent Nav. Co.*, 4 T. R. 581; *In re Webb*, 8 Taunt. 448.

⁹ *Cairns v. Robins*, 8 M. & W. 258; *Chapman v. Great Western Ry. Co.*, 28 W. R. 566.

¹⁰ *White v. Humphrey*, 11 Q. B. 43; *Cairns v. Robins*, ante.

¹¹ *Searle v. Laverick*, L. R. 9 Q. B. 122; *Harris v. Great Western Ry. Co.*, 45 L. J. Q. B. 189; *Giblin v. McMellin*, L. R. 2 P. C. 317.

dental fire,¹ or are injured or destroyed by rats,² or stolen,³ or are injured or destroyed by any casualty without his fault, he cannot be held responsible therefor.⁴ But according to the case last cited, the burden is upon him to show that he was not at fault.

SEC. 449. **Evidence of non-delivery.**—It is sufficient, in an action against a carrier for non-delivery, to show that the goods never reached the consignee;⁵ and whether the circumstances amount to a delivery in a given case is wholly a question for the jury.⁶ In case of a partial delivery, evidence that the weight or amount of goods delivered to the consignee is less than the weight or amount delivered to the carrier is *prima facie* sufficient to charge the latter for the deficiency, or to compel him to show that it did not arise from his negligence.⁷ So proof that goods were in a proper condition when delivered to the carrier, but were damaged when delivered by the latter to the consignee, is sufficient to charge the carrier with the damage.⁸ But the company may rebut the presumption arising from such proof by showing that the loss arose from some one of the excepted perils, or that they are exempted from liability, under the terms of the contract.

It is sufficient to show that the effect of an act of Nature could not have been prevented by any amount of foresight, pains, and care *reasonably* to be required of the carrier.⁹ But the carrier is bound as against all perils to do his utmost to protect the goods from loss or damage; and if an uncommon or unexpected danger arises, he must use efforts proportioned to the emergency to ward it off.¹⁰ If he fails to do so, he remains liable although the so-called act of God may have been the immediate cause of the mischief. If the immediate cause is the act of man although not amounting to negligence, it will not be an excuse for injury to goods, notwithstanding the elementary forces of Nature may have contributed.¹¹

SEC. 450. **Loss by Fire, Theft, etc.**—A common carrier is responsible for all losses, howsoever caused, whether from fire, theft, or robbery, except where the fire results from lightning or the robbery is

¹ Garside v. Trent Nav. Co., 4 T. R. 581.

² Cailiff v. Danvers, Peake, 114.

³ Finucane v. Small, 1 Esp. 315.

⁴ Mackenzie v. Cox, 9 C. & P. 632.

⁵ Griffiths v. Lee, 1 C. & P. 110; Gilbert v. Dale, 5 Ad. & El. 547; Evans v. Bristol, &c. Ry. Co., 10 W. R. 359.

⁶ Quiggin v. Dunn, 1 M. & W. 174.

⁷ Hawkes v. Smith, C. & M. 72.

⁸ Higginbotham v. Great Northern Ry. Co., 10 W. R. 358.

⁹ Nugent v. Smith, 1 C. P. D. 423.

¹⁰ Leek v. Maestaer, 1 Camp. 138.

¹¹ Oakley v. Portsmouth, &c. Packet Co., 11 Exchq. 618. The burden is on the plaintiff to prove non-delivery. Roberts v. Chittenden, 88 N. Y. 33.

by the king's enemies. This is an elementary principle, but it is not usually now applied in view of the universal custom of carriers to limit their liability by contract.¹

SEC. 451. Misconduct of a third Person. — If the loss is occasioned by the misconduct of a third person, and not through any fault or neglect on the part of the company, the latter are responsible to the owner, as they have a remedy over against the offending party.² But if the misconduct of the third person is caused by the orders of the owner of the goods, the company will not, of course, be responsible.³

The rule as to exemption from liability from the inherent nature of the thing carried has thus been stated and illustrated: A horse slips or falls, or kicks or plunges, or in some way hurts itself. If it does so from no cause other than its own inherent propensities, its "proper vice," — that is to say, from fright or temper, or struggling to keep its legs, — the company are not liable. But if it so hurts itself from any act of negligence of the company, or from any misfortune happening to the train, though not through any negligence of the company, — as for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, — then the company as insurers would be liable. If perishable articles are injured through their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them or by an extraordinary shock or shaking, whether through negligence or not, the company are liable.⁴

The company are not liable for injury or loss caused by the negligence of the owner or his servant, — as, where a man is sent in charge of cattle, and they are killed by reason of his negligence.⁵ If by the course of dealing the owner of the goods supplies the means of delivery, and these means fail without the fault of the carrier, the latter is exonerated, — as, where a pipe of wine was broken in delivery by the giving way of a skid supplied by the owner.⁶ Ordinarily, a company would not be liable for leakage of casks, if the leakage arises from an inherent defect in the cask, or from the manner in which the bung-hole was stopped; ⁷ but if during the journey the

¹ *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent, &c. Nav. Co.*, 5 T. R. 389.

² *Trent Nav. Co. v. Ward*, 3 Esp. 130.

³ *Butterworth v. Brownlow*, 34 L. J. C. P. 267.

⁴ *Kendall v. London, &c. Ry. Co.*, L. R. 7 Ex. 373; *Nugent v. Smith*, *ante*.

⁵ *Rooth v. North-Eastern Ry. Co.*, L. R. 2 Ex. 173.

⁶ *Nurrell v. Larkin*, 1 L. J. C. P. 2.

⁷ *Hudson v. Baxendale*, 6 W. R. 83.

case is perceived to be leaking, and the company's servants take no steps to prevent the leakage, the company would be liable.¹

If goods are improperly packed, and the company receives them only on the express condition that they are not to be responsible for improper packing, they will not be liable for an injury the goods may suffer through not being properly packed.² And apart from any such condition, if the packing or securing is that usually adopted for goods of a like nature, and the company is led by the consignor to suppose that it is sufficient in the particular case, they will not be liable if it proves insufficient, and injury or loss thereby results.³ But inasmuch as a company may refuse to receive improperly packed goods, or receive them only subject to conditions qualifying their liability, if they receive them without such qualification, and the defect is visible, they become liable if the goods are damaged, although partly through the packing, and the defective packing only goes in reduction of damages.⁴ Carrying in a manifestly unsafe condition is carrying without due care. And where a dog was delivered to a carrier, fastened only by a string, which was not sufficient to secure it, he was held liable for its loss because he had the means of seeing that the dog was not sufficiently secured.⁵

In no case will the misconduct of a third party, whereby the carrier is induced to deliver the goods to the wrong person, afford any excuse for the carrier's error. He assumes to insure against all losses, including those from robbery, theft, or fraud.⁶

SEC. 452. Fraud by the Customer. — A company will not be liable for loss caused by the fraud of the customer; as where he does anything to disguise the nature of the goods,⁷ or to lull the vigilance of

¹ *Beck v. Evans*, 16 East, 244; *Cox v. London, &c. Ry. Co.*, 3 F. & F. 77.

² *Barbour v. Southeastern Ry. Co.*, 34 L. T. N. S. 67.

³ *Richardson v. Northeastern Ry. Co.*, L. R. 7 C. P. 74.

⁴ *Higginbotham v. Great Northern Ry. Co.*, 10 W. R. 358.

⁵ *Stuart v. Crawley*, 2 Stark. 323; *Richardson v. Northeastern Ry. Co.*, L. R. 7 C. P. 74.

⁶ *Guillaume v. Gen. Transp. Co.*, 100 N. Y. 491; *Devereux v. Barclay*, 2 B. & Ald. 702; *Winslow v. Vermont, &c. R. Co.*, 42 Vt. 700; *Meyer v. Chicago, &c. R. Co.*, 24 Wis. 566; *Guillaume v. Packet Co.*, 42 N. Y. 12; *Southern Express Co.*

v. Van Meter, 17 Fla. 783; *Viner v. N. Y. Steamship Co.*, 50 N. Y. 23; *Edmunds v. Merchants' Disp. Co.*, 135 Mass. 233; 16 Am. & Eng. R. Cas. 250; *Conger v. Chicago, &c. R. Co.*, 24 Wis. 157; 1 Am. Rep. 164; *Chicago, &c. R. Co. v. Bovine*, 61 Miss. 288; 18 Am. & Eng. R. Cas. 644.

⁷ *Walker v. Jackson*, 10 M. & W. 16. Thus, in a very early case, the consignor attempted to hold the carrier liable for the loss of money which he had shipped concealed in a bag of hay in order to avoid the extra charges always made for the carriage of valuables. Lord MANSFIELD held that the carrier was not liable, that the contract of carriage was vitiated and annulled by

the company by treating a valuable parcel as of no or only ordinary value,¹ so as to prevent it from taking any particular care of it, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means the customer has adopted² for the holding out by the consignor as an ordinary risk what is in reality an extraordinary risk, and thus inducing the company to accept it as an ordinary risk, is a legal fraud.³

If the consignor has induced the company's agents to depart from their usual course of dealing, and to receive goods on terms and under circumstances different from those under which the consignor knew they were authorized to receive them, the company will not be liable.⁴ Where a company claim to be exempt from liability for fraud by reason of their special contract with the consignor or owner, it must be shown that the contract is in writing, and just and reasonable in its terms, and that the loss or injury is within the terms of the exemption. A contract with a company is to be construed most strongly against the company, as the maker of it.⁵

Where the delivery of the goods to the consignee is secured by fraud on his part, or by a promise to pay on delivery, the lien of the carrier for the freight due is not lost, notwithstanding his voluntary surrender of the goods when made under such circumstances.⁶

the consignor's fraud. *Gibbon v. Paignton*, 4 Burr. 2298.

¹ *Sleat v. Fagg*, 5 B. & Ald. 342.

² *Bradley v. Waterhouse*, M. & M. 154.

³ *Batson v. Donovan*, 4 B. & Ald. 37.

This principle has been affirmed in a large number of cases. See *Crouch v. London, &c. Ry. Co.*, 14 C. B. 255; 78 E. C. L. 255; *Phillips v. Earle*, 8 Pick. (Mass.) 182; *The Ionic*, 8 Blatchf. (U. S.) 538; *Chicago, &c. R. Co. v. Thompson*, 19 Ill. 578; *Chicago, &c. R. Co. v. Shea*, 66 Ill. 471; *Southern Express Co. v. Everett*, 37 Ga. 688; *Houston, &c. R. Co. v. Burke*, 55 Tex. 323; *Hayes v. Wells, Fargo, &c. Co.*, 23 Cal. 185; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85. A somewhat different doctrine seems to be upheld in *Rice v. Indianapolis, &c. R. Co.*, 3 Mo. App. 27, but the question seems not to have been much argued, and the opinion of the court is very meagre.

⁴ *Slim v. Gt. Northern Ry. Co.*, 23 L. J. C. P. 166; *Belfast, &c. Ry. Co. v. Keys*,

9 H. L. C. 556; *Edwards v. Sherratt*, 1 East, 604; *Harris v. Gt. Western Ry. Co.*, 45 L. J. Q. B. 737.

In the case of *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566, after an express package marked C. O. D. had been carried by the company and delivered to the consignee from whom the charges had been collected, it was discovered that the package was worthless, and the whole affair a scheme to defraud the consignee. On being informed of the circumstance the express agent returned to the consignee the money paid by him instead of forwarding it to the consignor. In an action by the consignor to recover the amount which should have been collected on delivery, the court held that, the whole affair being a swindle, the consignor had no standing in court, that the express agent had acted properly in returning the money to the consignee.

⁵ *Mitchell v. Lancashire, &c. Ry. Co.*, L. R. 10 Q. B. 256.

⁶ *Bigelow v. Heaton*, 6 Hill (N. Y.), 43;

While the bills of lading are not negotiable in the sense applicable to commercial paper, they are still transferable and carry with them the ownership, either general or special, of the property described; the carrier, unless he has limited his liability by stamping his bills as "non-negotiable," is bound to know that their office and effect is not limited to the person to whom they are first and directly issued, to recognize the validity of transfers, and to deliver the property only on the production and cancellation of the bills. A railroad company, therefore, is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill, has, in good faith, discounted a draft upon the consignee, although no property was in fact delivered.¹

SEC. 452 a. **Liability where there are Connecting Carriers.** — In a very early case in England, the rule was laid down that a carrier accepting goods consigned to a point beyond its line, in the absence of a special contract limiting its liability, undertakes to insure the safe delivery of such goods to the consignee at their destination, and is liable for any loss occurring in the course of the transportation, whether it occurred on its own or connecting lines.² And this rule has been constantly followed in that country,³ and in several of the States of the Union, including Alabama, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, New Hampshire, South Carolina, and Ten-

4 Denio (N. Y.), 496; case of 151 Tons of Coal, 4 Blatchf. (U. S.) 368.

¹ *Bank of Batavia v. New York, &c. R. Co.*, 106 N. Y. 195. In this case, one of defendant's local freight agents, having authority to receive and forward freight, and to give bills of lading specifying the terms of shipment but having no right to issue such a bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans for one W., describing them as received to be forwarded to C., as consignee, but adding with reference to the packages, "contents unknown." W. drew a draft on the consignee, which plaintiff discounted on the faith of and on transfer of the bill of lading. No barrels of beans were, in fact, shipped by W., or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of

the draft was refused. In an action upon the bills of lading, held that defendant was liable, and that the recital in the bills that the contents of the packages were unknown was no defence. *Bank of Batavia v. New York, &c. R. Co.*, 106 N. Y. 195.

² *Muschamp v. Lancaster, &c. R. Co.*, 8 M. & W. 421.

³ *Bristol, &c. R. Co. v. Collins*, 7 H. L. Cas. 194; 29 L. J. Exch. 41; *Scothorn v. South Staffordshire Ry. Co.*, 8 Exch. 341; *Mitton v. Midland R. Co.*, 4 H. & N. 615; 28 L. J. Exch. 385; *Crouch v. London, &c. R. Co.*, 14 C. B. 255; 78 E. C. L. 255; *Coxon v. Great Western R. Co.*, 5 H. & N. 615. These cases go so far as to hold that only the initial carrier can be held liable even though it may be proven that the loss occurred on a connecting line, on the ground that there is no privity of contract between the consignor and the connecting carriers. See *post*, p. 1926.

nessee. The courts of these States hold that a carrier which receives goods for transportation, marked for a particular destination beyond its line, by its acceptance impliedly undertakes to insure their safe deliverance at such destination.¹ The Supreme Court of New Hampshire, dealing with this question, state their reasons for upholding the English rule: "The great value of commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that where goods are once intrusted to carriers on these long routes, they are placed beyond all control and supervision of the owners, — are cogent reasons for holding those who associate in these connected lines to a rule that shall give an effectual and convenient remedy to the owner whose goods have been lost or damaged on any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and whole policy of the common law. What, then, is the situation of the owner whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier on whose part of the route the damage may have happened? In the first place, he must set about learning where his loss happened. This would often be difficult and sometimes quite impossible. Suppose an invoice of flour, shipped in good order at Ogdensburgh, were found, on arrival at Boston, to have been damaged somewhere on the route; or suppose a trunk, checked at Boston for Chicago, was broken open and plundered before it reached Chicago, — what would the owner's chance be worth of finding out on what particular part of the route the damage happened?

¹ *Mobile, &c. R. Co. v. Copeland*, 83 Ala. 219; 35 Am. Rep. 13; *Montgomery, &c. R. Co. v. Culver*, 75 Ala. 578; 51 Am. Rep. 433; 22 Am. & Eng. R. Cas. 411; *Louisville, &c. R. Co. v. Meyer*, 78 Ala. 597; 27 Am. & Eng. Cas. 44; *Bennett v. Filyan*, 1 Fla. 403; *Illinois Cent. R. Co. v. Cowles*, 32 Ill. 116; *Chicago, &c. R. Co. v. People*, 56 Ill. 365; 8 Am. Rep. 690; *Chicago, &c. R. Co. v. Montfort*, 60 Ill. 175; *Field v. Chicago, &c. R. Co.*, 71 Ill. 458; *Erie R. Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Angle v. Mississippi, &c. R. Co.*, 9 Iowa, 485; *Muligan v. Illinois Cent. R. Co.*, 36 Iowa, 181; 14 Am. Rep. 514; *Beard v. St. Louis, &c. R. Co.*, 79 Iowa, 527; 44

N. W. Rep. 803; *Cincinnati, &c. R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Berg v. Atchison, &c. R. Co.*, 30 Kan. 561; 16 Am. & Eng. R. Cas. 229; *Atchison, &c. R. Co. v. Roach*, 35 Kan. 740; 27 Am. & Eng. R. Cas. 257; *Carter v. Peck*, 4 Sneed (Tenn.), 203; 67 Am. Dec. 604; *East Tenn. R. Co. v. Nelson*, 1 Cold. (Tenn.) 172; *East Tenn. R. Co. v. Rogers*, 6 Heisk. (Tenn.) 143, 208; *Louisville, &c. R. Co. v. Weaver*, 9 Lea (Tenn.), 38; 42 Am. Rep. 654; 16 Am. & Eng. R. Cas. 218 (authorities extensively reviewed in this case); *Galveston, &c. R. Co. v. Allison*, 59 Tex. 193; 12 Am. & Eng. R. Cas. 28.

He would have no means of learning himself; and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connecting line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants."¹ The forlorn condition of the owner in such a case is put in a strong light by WAITE, C. J., in his dissenting opinion in a Connecticut case.² In South Carolina, while the earlier cases³ unqualifiedly sustain the English doctrine, it is said in a later case⁴ that while the initial carrier *may* assume liability for the entire route, it does not assume liability for losses beyond its own line, except by express contract, and that whether or not such contract was made, either by parol or in writing, is a question for the jury, who are also to determine what is the actual contract between the parties.

In some of the States the doctrine is established by statute. Thus, in Missouri, it is provided that a carrier receiving goods for through transportation shall be liable for injuries occurring anywhere on the route;⁵ while in Georgia, it is provided that where there are several connecting roads over which goods are transported, each company shall be responsible only to its own terminus, and until delivery to the connecting road, and that the last company which has received the goods "as in good order"

¹ *Nashua Locks Co. v. Worcester, &c.* R. Co., 48 N. H. 339; 2 Am. Rep. 242, 265. The court in this case reviews exhaustively the English and American authorities. See also *Gray v. Jackson*, 51 N. H. 9; 12 Am. Rep. 1. "Upon grounds of public policy it is better to put upon the carrier the duty of tracing up the loss and fixing it upon the party first liable, than to put the duty on the owner." *Memphis, &c. R. Co. v. Holloway*, 9 Baxt. (Tenn.) 188.

² *Elmore v. Naugatuck R. Co.*, 23 Conn. 478; 63 Am. Dec. 143.

³ *Bradford v. So. Car. R. Co.*, 7 Rich. L. (S. C.) 201; 42 Am. Dec. 411; *Kyle v. Laurens R. Co.* 10 Rich. L. (S. C.), 332; 70 Am. Dec. 231.

⁴ *Piedmont Mfg. Co. v. Columbia, &c.* R. Co., 19 S. C. 353; 16 Am. & Eng. R. Cas. 194.

⁵ Such a statute is not unconstitutional. *Dimmitt v. Kansas City, &c. R. Co.*, 103 Mo. 433; 15 S. W. Rep. 761; *Nines v. St. Louis, &c. R. Co. (Mo.)*, 18 S. W. Rep. 26. The statute applies to a contract made in Missouri for carriage from a point within that State to a point outside. *Watkins v. St. Louis, &c. R. Co.* 44 Mo. App. 245. To charge a connecting carrier it must be shown that the loss occurred on its line, or that it assumed a special liability; and its soliciting agents have no authority to assume for it such special responsibility. *Crouch v. Louisville, &c. R. Co.*, 42 Mo. App. 248.

shall be responsible to the consignee for any damage to them, open or concealed.¹

But the doctrine generally adopted in this country, both by the State and Federal Courts, is that the initial carrier is liable only for injuries occurring on its own line, or for failure to make prompt and proper delivery to the connecting carrier. It is urged that it is unreasonable to hold any company liable for injuries to the property, occurring while it is entirely beyond its control and in the hands of a company over whom it can exercise no authority or direction.² A carrier may unquestionably contract to deliver goods to a point beyond its own line, and may assume responsibility for their safety over the whole route.³ It has an equal right to limit its

¹ Ga. Code, § 2084. Where the action is against the last carrier, and it is not shown that it received the goods in good order, and it appears that before reaching such carrier they were carried by steamship, a non-suit is properly ordered. Such case is not within the statute. *Joseph v. Georgia R. Co.*, 88 Ga. 426; 14 S. E. Rep. 591; *following Evans v. Railroad Co.*, 56 Ga. 498. Nor does the statute apply unless the declaration alleges that defendant (the last carrier) received the goods in good order; and there being no such allegation, defendant may show that injury occurred not on its line. *Western, &c. R. Co. v. Exposition*, 81 Ga. 522; 35 Am. & Eng. R. Cas. 602. Before the passage of this statute the English rule prevailed. See *Rome, &c. R. Co. v. Sullivan*, 25 Ga. 228; *Mosher v. So. Express Co.*, 38 Ga. 37, 519; *Cohen v. So. Exp. Co.*, 45 Ga. 148. The statute applies only to cases where there was no contract, express or implied, by the first company to carry the goods to their destination. *Falvey v. Georgia R. Co.*, 76 Ga. 597.

² *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123; *St. Louis Ins. Co. v. St. Louis, &c. R. Co.*, 104 U. S. 146; 3 Am. & Eng. R. Cas. 260; *Denning v. Norfolk, &c. R. Co.*, 21 Fed. Rep. 25; 16 Am. & Eng. R. Cas. 232; *Elmore v. Naugatuck R. Co.*, 23 Conn. 478; 63 Am. Dec. 143; *Converse v. Norwich Tr. Co.*, 33 Conn. 166; *Pittsburgh, &c. R. Co. v. Morton*, 61 Ind. 539; 28 Am. Rep. 682; *Cummins v. Dayton, &c. R. Co.* (Ind. 1882), 9 Am. & Eng. R. Cas. 36; *Perkins v. Portland, &c. R. Co.*,

47 Me. 573; 74 Am. Dec. 507; *Skinner v. Hall*, 60 Me. 477; 61 Me. 517; *Baltimore, &c. R. Co. v. Schumaker*, 29 Md. 168; 96 Am. Dec. 510; *McMillan v. Mich. Southern R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Detroit, &c. R. Co. v. McKenzie*, 43 Mich. 609; 9 Am. & Eng. R. Cas. 15; *Rickerson R. M. Co. v. Grand Rapids, &c. Co.*, 67 Mich. 110; 32 Am. & Eng. R. Cas. 487; *Irish v. Milwaukee, &c. R. Co.*, 19 Minn. 376; 18 Am. Rep. 340; *Lawrence v. Winona, &c. R. Co.*, 15 Minn. 390; 2 Am. Rep. 130; *Crawford v. So. Railroad Assoc.*, 51 Miss. 222; 24 Am. Rep. 626; *Knott v. Raleigh, &c. R. Co.*, 98 N. C. 73; 32 Am. & Eng. R. Cas. 481; *Camden, &c. R. Co. v. Forsythe*, 61 Penn. St. 81; *American Exp. Co. v. Second Nat. Bank*, 69 Penn. St. 394; 8 Am. Rep. 268; *Knight v. Providence, &c. R. Co.*, 13 R. I. 572; 9 Am. & Eng. R. Cas. 90; *Harris v. Grand Trunk R. Co.*, 15 R. I. 371; 26 Am. & Eng. R. Cas. 323; *Hunter v. So. Pac. R. Co.*, 76 Tex. 195; 13 S. W. Rep. 190; *Noyes v. Rutland, &c. R. Co.*, 27 Vt. 110; *Bank v. Transportation Co.*, 23 Vt. 186; *Brintall v. Saratoga, &c. R. Co.*, 32 Vt. 665; *Hadden v. U. S., &c. Exp. Co.*, 52 Vt. 335; 6 Am. & Eng. R. Cas. 443. Since a clause in a bill of lading, stipulating that the carrier will not be liable for losses beyond its line is merely a statement of the common law on the subject, it is no fraud to suppress it from an ignorant shipper. *Hadden v. U. S., &c. Exp. Co.*, 52 Vt. 335; 6 Am. & Eng. R. Cas. 443.

³ *Houston, &c. R. Co. v. Hill* (Tex.), 21 Am. & Eng. R. Cas. 263; *Cum-*

liability to losses occurring on its own lines.¹ *The real question then is what is the contract between the parties, and the ground of difference between the two classes of authorities is as to what undertaking is to be implied from the act of the carrier in accepting for transportation goods destined for a point on a connecting line. As expressed in the opinion of SIMPSON, J., of the South Carolina Court: "There is really no great difference between the English and American doctrine on this subject. The one holds that to exempt a carrier from liability beyond its terminus there must be a special contract to that end. The other, that to make the first carrier responsible there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so, and if he undertakes to do so he is bound by his undertaking. In the one case, if the contract contains no exemption, it is absolute; in the other, if the conditions are specified they must govern. This is nothing more than saying that the whole thing is per contract, and that whatever the contract is that must be enforced."*² All of which is a very sensible statement of the principles governing a much clouded topic. But it seems to us far more reasonable to suppose that the carrier did not intend to assume such unusual liability, nor should it be held to have impliedly done so where there is no special consideration moving;³ and it is held by the Supreme Court that such unusual liability will not attach in the absence of a special agreement, nor will such an agreement be implied from loose language or doubtful expressions, but only from

mins v. Dayton, &c. R. Co. (Ind. 1882), 9 Am. & Eng. R. Cas. 36; *Swift v. Pacific Mail, &c. Co.* (N. Y.), 30 Am. & Eng. R. Cas. 105; *Lindley v. Richmond, &c. R. Co.*, 88 N. C. 547; 9 Am. & Eng. R. Cas. 31; *Phillips v. North Car. R. Co.*, 78 N. C. 294; *Bryan v. Memphis, &c. R. Co.*, 11 Bush (Ky.), 597. This power has been denied in but one case, *Hood v. New York, &c. R. Co.*, 22 Conn. 1, 542. As to what is evidence of such a contract, see *St. Louis, &c. R. Co. v. Larned*, 102 Ill. 293; 6 Am. & Eng. R. Cas. 436.

¹ *East Tenn., &c. R. Co. v. Brumley*, 5 Lea (Tenn.), 401; 6 Am. & Eng. R. Cas. 356; *Berg v. Atchison, &c. R. Co.*, 30 Kan. 561; 16 Am. & Eng. R. Cas. 229; *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1.

² *Piedmont Mfg. Co. v. Columbia, &c. R. Co.*, 19 S. C. 353; 16 Am. & Eng. R. Cas. 194.

³ *Detroit, &c. R. Co. v. McKenzie*, 43 Mich. 609; 9 Am. & Eng. R. Cas. 15. The rule of the text is sustained, but it is held that if the first carrier receipts for the goods consigned to a point beyond its line for a definite sum named, and the consignor is charged a larger sum, it may reasonably be presumed that a liability over the entire route is assumed. *Clyde v. Hubbard*, 88 Penn. St. 358, takes the same view as expressed by the Carolina court, but holds that where a company holds itself out as a "through freight line," and contracts to carry as such it will be liable for all losses wherever occurring.

clear and satisfactory proof.¹ While the force of the reasoning presented by the New Hampshire Court must be admitted, it seems that the principal objection there raised to the American doctrine is obviated by the rule which places upon the initial carrier, or any carrier through whose hands the goods passed, the burden of proof to show that it delivered them safely and in good order to the next carrier.²

The English courts hold that the shipper can only hold the initial carrier liable, even though the loss is shown to have occurred on a connecting line; this on the ground that there is no privity of contract between him and the connecting carrier.³ But such a doctrine does not exist in this country, and any carrier may be held liable if the loss can be shown to have occurred on its line; it cannot deny the authority of the initial carrier to make a contract of carriage for it after it has received the consignment and attempted to transport it.⁴ The connecting carrier may be held liable for losses on its line, even though the initial carrier had contracted to assume liability over the whole route.⁵ And on proof that any carrier on the route received the goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, it being peculiarly and almost solely within its power to make such proof.⁶

Where the goods are to pass over several connecting lines, all limitations of liability expressed or embraced in the contract with the first carrier enure to the benefit of connecting carriers, as the undertaking of such carriers is determined entirely by the contract made with the initial carrier.⁷ But if a connecting carrier makes a

¹ Mich. Cent. R. Co. v. Myrick, 107 U. S. 102; 9 Am. & Eng. R. Cas. 105.

² Mobile, &c. R. Co. v. Tupelo, &c. Co., 67 Miss. 35; 7 So. Rep. 279.

³ The case of Alabama, &c. R. Co. v. Mt. Vernon Co., 84 Ala. 173; 35 Am. & Eng. R. Cas. 57, seems to hold the same way.

⁴ Norfolk, &c. R. Co. v. Read, 87 Va. 185; 12 S. E. Rep. 395; Atchison, &c. R. Co. v. Roach, 35 Kan. 740; 27 Am. & Eng. R. Cas. 257.

⁵ Aigen v. Boston, &c. R. Co., 132 Mass. 423; 6 Am. & Eng. R. Cas. 423.

⁶ Mobile, &c. R. Co. v. Tupelo, &c. Co., 67 Miss. 35; 7 So. Rep. 279; Savannah, &c. R. Co. v. Harris, 26 Fla. 148;

7 So. Rep. 544; Ohio, &c. R. Co. v. Emrich, 24 Ill. App. 245. *Contra*, Montgomery, &c. R. Co. v. Culver, 75 Ala. 587; 22 Am. & Eng. R. Cas. 411; 51 Am. Rep. 483.

⁷ Western R. Co. v. Harwell, 91 Ala. 340; 8 So. Rep. 649; Jones v. Cincinnati, &c. R. Co., 89 Ala. 376; 8 So. Rep. 61; Kiff v. Atchison, &c. R. Co., 32 Kan. 263; 18 Am. & Eng. R. Cas. 618; Babcock v. Lake Shore, &c. R. Co., 49 N. Y. 494; U. S. Express Co. v. Harris, 51 Md. 127; Manhattan Oil Co. v. Camden, &c. R. Co., 54 N. Y. 197; Taylor v. Little Rock, &c. R. Co., 39 Ark. 148; 18 Am. & Eng. R. Cas. 590; Whitworth v. Erie R. Co., 82 N. Y. 413; 6 Am. & Eng. R. Cas. 349. A

new and different contract, evidenced by a new receipt, it is precluded from claiming any exemption under the first contract, even though this first contract expressly provided that the exemptions it contained should enure to the benefit of connecting carriers.¹ The contract may specifically provide that the limitations shall be for the benefit only of the initial carrier, and in such a case, the connecting carrier cannot claim to be included.²

Where it can be shown that the connecting lines though operated by different companies are really component parts of a single system, and that the various companies occupy a partnership relation, the initial company may be held liable for a loss wherever occurring, irrespective of the character of the contract entered into, provided of course there are no stipulations in it, consented to by the shipper, expressly limiting the liability.³ The question then arises what connection is sufficient to constitute such a partnership relation. The fact that one company is a mere stockholder in a connecting railroad does not create it.⁴ Nor does a traffic arrangement between two companies, which confers a license on the one to use the track of the other and limits their right to make certain charges for freight and passengers, create this partnership relation and make each company the agent of the other.⁵ There must be such an arrangement between them as to constitute them parts of a system which is under one general direction and control.

SEC. 452 *b.* Carriage of Live Stock.—It has been already observed that there is an exception to the carrier's liability as insurer in the case of injuries resulting from the intrinsic character of the goods shipped. The most frequent application of this rule arises in the carriage of live stock. The rule is very clearly stated in the opinion in a recent case in Minnesota,⁶ where the court observed: "Carriers of live stock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the

provision in the bill of lading which limits the liability for goods lost to the carrier on whose line the loss occurs is valid. *Texas, &c. R. Co. v. Adams*, 78 Tex. 372; 14 S. W. Rep. 666. See *ante*, p. 1891.

¹ *Browning v. Goodrich Tr. Co.*, 78 Wis. 391; 47 N. W. Rep. 428.

² *Bancroft v. Merchants' Transp. Co.*, 47 Iowa, 262; *Martin v. American Express Co.*, 19 Wis. 336; *Camden, &c. R. Co. v.*

Forsythe, 61 Penn. St. 81; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123.

³ *Hart v. Rensselaer, &c. R. Co.*, 8 N. Y. 37; 59 Am. Dec. 447.

⁴ *Atchison, &c. R. Co. v. Cochran*, 43 Kan. 225; 23 Pac. Rep. 151.

⁵ *St. Louis, &c. R. Co. v. Niel* (Ark.), 19 S. W. Rep. 963.

⁶ *Boehl v. Chicago, &c. R. Co.*, 44 Minn. 191.

vitality of the freight, — that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, restiveness, fright, viciousness, kicking, or goring, etc. The carrier is relieved from liability for injuries from such causes if he has provided suitable means of transportation, and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury.¹ . . . But if the injury or loss arise in

¹ *Rixford v. Smith*, 52 N. H. 355; 13 Am. Rep. 42; 67 Am. Dec. 210; *Evans v. Fitchburg R. Co.*, 111 Mass. 142; *Moulton v. St. Paul, &c. R. Co.*, 31 Minn. 85; *Cragin v. N. Y. Central R. Co.*, 51 N. Y. 61; *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442; *Clarke v. Rochester, &c. R. Co.*, 14 N. Y. 570; 62 Am. Dec. 210; *Smith v. New Haven, &c. R. Co.*, 12 Allen (Mass.), 531. It has been held in a Michigan case that railroad companies are not common carriers of live stock, that they cannot be compelled to accept such freight or to be responsible for it as insurers. See *Michigan Southern R. Co. v. McDonough*, 21 Mich. 165. And this view has been reaffirmed in subsequent cases. See *Lake Shore, &c. R. Co. v. Perkins*, 25 Mich. 329 (*overruling*, 6 Mich. 243); *Gt. Western R. Co. v. Hawkins*, 18 Mich. 427. But with this exception the American authorities are unanimous in upholding the doctrine of the text, that railroad companies are common carriers of live stock, that their liability for a loss is the same in such cases as where other goods are carried, with the single exception that there is no liability for losses, the proximate cause of which was the intrinsic character of the freight. *Mich. Central R. Co. v. Myrick*, 107 U. S. 102; 9 Am. & Eng. R. Cas. 25; *East Tenn., &c. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Agnew v. Contra Costa R. Co.*, 27 Cal. 425; *Cowpland v. Housatonic R. Co.*, 61 Conn. 531; *Georgia, &c. R. Co. v. Spears*, 66 Ga. 489; 42 Am. Rep. 81; *Georgia, &c. R. Co. v. Beattie*, 66 Ga. 438; 42 Am. Rep. 75; *St. Louis, &c. R. Co. v. Dorman*, 72 Ill. 504; *Toledo, &c. R. Co. v. Thompson*, 71 Ill. 434; *Evansville, &c. R. Co. v. Young*, 28 Ind. 516 (see *Lake Shore, &c. R. Co. v. Bennett*, 89 Ind. 457; 6 Am. & Eng. R. Cas. 391); *McCoy v. Keo-*

kuk, &c. R. Co., 44 Iowa, 424; *Kinnick v. Chicago, &c. R. Co.*, 69 Iowa, 665; 27 Am. & Eng. R. Cas. 55; *Kansas, &c. R. Co. v. Reynolds*, 8 Kan. 623; *Kansas City, &c. R. Co. v. Simpson*, 30 Kan. 645; *St. Louis, &c. R. Co. v. Piper*, 13 Kan. 510; *Louisville, &c. R. Co. v. Hedger*, 9 Bush (Ky.), 645; *Peters v. New Orleans, &c. R. Co.*, 16 La. An. 222; *Sager v. Portsmouth, &c. R. Co.*, 31 Me. 228; *Evans v. Fitchburg, &c. R. Co.*, 111 Mass. 142; *Squire v. N. Y. Central R. Co.*, 98 Mass. 239; *Moulton v. St. Paul, &c. R. Co.*, 31 Minn. 85; 12 Am. & Eng. R. Cas. 13; *Chicago, &c. R. Co. v. Abels*, 60 Miss. 1017; *Clark v. St. Louis, &c. R. Co.*, 64 Mo. 440; *Dawson v. St. Louis, &c. R. Co.*, 76 Mo. 514; *McFadden v. Railroad Co.*, 92 Mo. 343; *Atchison, &c. R. Co. v. Washburn*, 5 Neb. 117; *Rixford v. Smith*, 52 N. H. 355; 13 Am. Rep. 42; *Penn v. Buffalo, &c. R. Co.*, 49 N. Y. 204; *Myrard v. Binghampton, &c. R. Co.*, 71 N. Y. 180; *Lee v. Raleigh, &c. R. Co.*, 72 N. C. 236; *Welsh v. Pittsburgh, &c. R. Co.*, 10 Ohio St. 72; *Wilson v. Hamilton*, 4 Ohio St. 722; *Powell v. Pennsylvania R. Co.*, 32 Penn. St. 414; *Bamberg v. South Car. R. Co.*, 9 S. C. 61; *Louisville, &c. R. Co. v. Wynn*, 88 Tenn. 325; *Smitha v. Railroad Co.*, 86 Tenn. 198; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Kimball v. Rutland, &c. R. Co.*, 26 Vt. 247; *Virginia, &c. R. Co. v. Sayers*, 26 Gratt. (Va.) 328; *Maslin v. Baltimore, &c. R. Co.*, 14 W. Va. 180; *Ayres v. Chicago, &c. R. Co.*, 71 Wis. 372; *Morrison v. Construction Co.*, 44 Wis. 405. See also *South, &c. R. Co. v. Heinlein*, 52 Ala. 606; *Rhodes v. Railroad Co.*, 9 Bush (Ky.), 688; *Hall v. Renfro*, 3 Metc. (Ky.) 51; *Ohio, &c. R. Co. v. Dunbar*, 20 Ill. 623.

whole or in part from the carrier's negligence, without the fault or concurring negligence of the owner or his agent, or from extrinsic causes other than inevitable accident, the carrier is liable as in other cases. And it is enough to make a *prima facie* case against him that the owner allege and show the delivery of the property to the carrier, and the nature of the loss or damage suffered during its transit. It will then devolve on the carrier to show that such injury was caused without his fault, and from the inherent nature and propensity, or 'proper vice' as it is sometimes called, of the animals transported."¹ The opinion has been advanced that because of the peculiar character of the freight, the carrier could not be held liable as insurer at all, but only for loss occasioned through his negligence;² but this cannot be said to have the support of much authority, and is not now accepted.³

¹ *Boehl v. Chicago, &c. R. Co.*, 44 Minn. 192; *Shriver v. Sioux City, &c. R. Co.*, 24 Minn. 506; *Hull v. Chicago, &c. R. Co.*, 41 Minn. 510; *Evans v. Fitchburg, &c. R. Co.*, 111 Mass. 142; *Toledo, &c. R. Co. v. Durkin*, 76 Ill. 395; *Chicago, &c. R. Co. v. Abels*, 60 Miss. 1017; *McCoy v. Keokuk, &c. R. Co.*, 44 Iowa, 424; *The Saragossa*, 3 Woods (U. S.), 380. Compare *Kendall v. London, &c. Ry. Co.*, L. R. 7 Exch. 373. But it seems that where by the terms of the contract of carriage the consignor undertakes the duty of caring for the stock while in transit, the burden rests upon him to prove affirmatively the negligence of the carrier. *Clark v. St. Louis, &c. R. Co.*, 64 Mo. 440; *Oxley v. St. Louis, &c. R. Co.*, 65 Mo. 629; *McBeath v. Wabash, &c. R. Co.*, 20 Mo. 445; *Bankard v. Baltimore & O. R. Co.*, 34 Md. 197; *Louisville, &c. R. Co. v. Hedger*, 9 Bush (Ky.), 645; *St. Louis, &c. R. Co. v. Piper*, 13 Kan. 510.

² This idea has been advanced in a number of English cases, so much so as to induce grave doubts as to whether the liability of a carrier of live stock was any more than that of a carrier of passengers; that is as to whether it was liable except for actual negligence. See *Pardington v. South Wales Ry. Co.*, 1 H. & N. 392; 38 Eng. L. & Eq. 432; *McManus v. Lancashire, &c. Ry. Co.*, 4 H. & N. 347; 2 H. & N. 693; 4 Jur. n. s. 144; *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749; *Carr v. Lancashire, &c. Ry. Co.*, 7 Exch. 711.

But the later English cases establish conclusively the rule of the text as stated by the Minnesota court, and the doctrine now no longer admits of question. Thus, in *Kendall v. London, &c. Ry. Co.*, L. R. 7 Exch. 373, which was an action for damages for an injury to a horse, incurred while being transported over the defendant's road, *BRAMWELL, B.*, stated the law thus: "There is no doubt that the horse in this case was the immediate cause of his own injuries,—that is to say, no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some other way hurt itself. If it did so from no cause other than its inherent propensities, its proper vice,—that is to say, from fright, or temper, or struggling to keep its legs,—the defendants are not liable. But if it so hurt itself from defendant's negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the track owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liable." See the same views upheld in *Gt. Western Ry. Co. v. Blower*, L. R. 7 C. P. 655. *Brass v. Maitland*, 6 El. & Bl. 470; 88 E. C. L. 470; *Hutchinson v. Guion*, 5 C. B. n. s. 149; 94 E. C. L. 149; *Hearne v. Garton*, 2 El. & El. 66; 105 E. C. L. 66; *Roberts v. Gt. Western Ry. Co.*, 4 Ad. & El. n. s. (4 Q. B.) 506; 45 E. C. L. 506; *Nugent v. Smith*, 1 C. P. Div. 423.

³ See *Hutchinson on Carriers* (2d ed.),

It being thus the settled doctrine that railroad companies are common carriers of live stock, they are liable in damages for a refusal to accept such stock as freight, unless the refusal is based upon some special and reasonable ground.¹ The fact that they were offered by a connecting line on Sunday affords no excuse.²

This exception to the carrier's liability exists independently of any special contract, being implied by law;³ the carrier may stipulate for further exemption by special contract, except that in no case can he properly contract for exemption from liability for the consequences of his own negligence. Though a different doctrine is maintained in New York and one or two other jurisdictions, it is believed to be unfounded in principle, and is certainly opposed by all authority.⁴

It is a part of the carrier's duty in the transportation of live stock to provide cars that are safe and suitable for such a purpose, and equipped with such appliances as will render the risk of loss from the action of the animals themselves as slight as possible. In a Massachusetts case,⁵ it appeared that owing to the weakness of the door of the car, it was broken by the struggles of the cattle, and several of them fell out and were lost. The court, in speaking of the company's duty, said: "In arrangements and precautions to guard against injuries occasioned by the faults and vices of animals to themselves or each other, the carrier is bound to use an amount of diligence analogous to that required of passenger carriers in the transportation of human beings. But the sufficiency of a car door to resist the struggles of animals, however unruly, it is in the power of the railroad company to secure; and its obligation in this respect is not satisfied by furnishing a reasonably strong car. The company is bound to have an absolutely and actually sufficient car. It

§§ 219, 220; 3 Am. & Eng. Ency. Law, pp. 3-5; *Rixford v. Smith*, 52 N. H. 35; 13 Am. Rep. 42; *Michigan Central R. Co. v. Myrick*, 107 U. S. 102; 9 Am. & Eng. R. Cas. 25.

¹ *South Alabama, &c. R. Co. v. Heinlein*, 52 Ala. 606; *Ballentyne v. North Missouri R. Co.*, 40 Mo. 491; *Texas, &c. R. Co. v. Nicholson*, 61 Tex. 491; *Wabash, &c. R. Co. v. Black*, 11 Ill. App. 465. The Michigan doctrine is *contra*. *Lake Shore, &c. R. Co. v. Perkins*, 25 Mich. 329; 12 Am. Rep. 275. In the case of *Chicago, &c. R. Co. v. Erickson*, 91 Ill. 613, the carrier refused to receive a carload of Texas cattle, on the ground that

a statute of the State prohibited the transportation of such cattle within the State during certain portions of the year. It was held that the statute was void as an interference with interstate commerce and afforded no protection to the carrier.

² *Philadelphia, &c. R. Co. v. Lehman*, 56 Md. 209; *Guinn v. Wabash, &c. R. Co.*, 20 Mo. App. 209.

³ *Boehl v. Chicago, &c. R. Co.*, 44 Minn. 192; 46 N. W. Rep. 333.

⁴ The rule in this connection is the same as that applicable to other classes of goods, see *ante*, § 425.

⁵ *Smith v. New Haven, &c. R. Co.*, 12 Allen (Mass.), 531, 534.

is practicable to make a car so thoroughly strong that cattle cannot break it down and fall out. For any failure to do so the carrier is responsible." And this statement embodies the general doctrine.¹ The carrier may, by a special provision in the contract, impose on the consignor the responsibility of determining whether or not the cars are sufficiently safe.² But it seems that such a provision could only be binding on the shipper as to such defects which were apparent to an unskilled eye, it could not release the carrier where the injury resulted from a defect in the rolling apparatus.

It is also a part of the carrier's duty, in the absence of special contract, to load and unload the stock,³ to provide them with a proper amount of food and water,⁴ and generally to take such precau-

¹ *Smith v. New Haven, &c. R. Co.*, 12 Allen (Mass.), 531; *Pratt v. Ogdensburgh R. Co.*, 102 Mass. 557; *Indianapolis, &c. R. Co. v. Strain*, 81 Ill. 504; *St. Louis, &c. R. Co. v. Dorman*, 72 Ill. 504; *McDaniel v. Chicago, &c. R. Co.*, 24 Iowa, 412; *Rhodes v. Louisville, &c. R. Co.*, 9 Bush (Ky.), 688; *Peters v. New Orleans, &c. R. Co.*, 16 La. An. 222; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Welsh v. Pittsburgh, &c. R. Co.*, 10 Ohio St. 65; *Kimball v. Rutland, &c. R. Co.*, 26 Vt. 247; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123; *McManus v. Lancashire, &c. Ry. Co.*, 4 H. & N. 327; *Gt. Western Ry. Co. v. Blower*, L. R. 7 C. P. 655; *Shaw v. Gt. Southern Ry. Co.*, L. R. 8 Ir. 10. The carrier is not relieved from liability by the fact that the cars in which the cattle are being transported belong to another company. It is not bound to transport them in the same cars in which they are received from a connecting line, and if it does so, it assumes the risk. *Wallingford v. Columbia, &c. R. Co.*, 26 S. C. 258; *McAlister v. Chicago, &c. R. Co.*, 74 Mo. 351; *Combe v. London, &c. Ry. Co.*, 31 L. T. n. s. 613; 1 *Mew's Fisher's Digest*, p. 2026. In Missouri, there is a statute requiring that railroad companies shall furnish double-decked cars for the transportation of sheep. Such a statute is considered not unconstitutional as interfering with interstate commerce. Certainly it is not an unreasonable restriction upon the rights of the companies. See *Emerson v. St. Louis, &c. R. Co.*, 111 Mo. 161.

² *Squire v. N. Y. Central R. Co.*, 98 Mass. 239; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Ill. Central R. Co. v. Hall*, 58 Ill. 409; *Chicago, &c. R. Co. v. Van Dressor*, 22 Wis. 511; *Wilson v. N. Y. Central R. Co.*, 97 N. Y. 87; 21 Am. & Eng. R. Cas. 149; *Gregory v. West Midland Ry. Co.*, 2 H. & C. 944.

³ *Squire v. N. Y. Central R. Co.*, 98 Mass. 239; *South, &c. R. Co. v. Heinlein*, 52 Ala. 606; 23 Am. Rep. 578; *Dawson v. St. Louis, &c. R. Co.*, 76 Mo. 514; *Myers v. Wabash, &c. R. Co.*, 90 Mo. 98; 27 Am. & Eng. R. Cas. 53.

⁴ *Ill. Central R. Co. v. Adams*, 42 Ill. 474; *Toledo, &c. R. Co. v. Thompson*, 71 Ill. 434; *Gt. Northern Ry. Co. v. Swaffield*, L. R. 9 Exchq. 152. A Texas statute makes it the duty of the carrier to feed and water the stock during the course of the journey, unless it is otherwise provided by special contract. Under this provision, if the stock are being carried in a car not properly constructed for feeding and watering, it is incumbent on the company to furnish places where the stock can be unloaded, and watered, and fed, without injury, in any kind of weather, as far as practicable. *International, &c. R. Co. v. McCrae*, 82 Tex. 614. In the case of *Conpland v. Housatonic, &c. R. Co.*, 61 Conn. 531, the shipper's agent, in the course of the journey, informed the conductor that the animals were greatly frightened and in danger of being hurt or killed by further transportation, and asked to have his car set out at an intermediate station. It was held that it was the con-

tions as are reasonably practicable to prevent any injury in the course of the journey.¹ All these duties, however, may, by special stipulations in the bill of lading, be transferred to the shipper,² and all duty of care and attention is removed from the carrier when the shipper accompanies the stock and assumes to take charge of them,³ though even in such a case the carrier is bound to afford him reasonable facilities and opportunity for feeding and watering them, etc.⁴

The plaintiff's cattle were transported by the defendant from B. to W. under a contract which provided, among other things, that in consideration of a reduced price for transportation the plaintiff would assume the risk of damage sustained by delay in transportation; also that the plaintiff should load and unload at his own risk, the defendant furnishing help; and the plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle, being without food, were injured. In an action to recover damages for the injury it was held, that the defendant was not bound to unload the cattle when the train was stopped, but that it was its duty, upon reasonable request, so to place the cars in which the cattle were as to be con-

ductor's duty to comply with the request, if it was reasonably practicable to do so, and that a neglect to comply was negligence.

¹ *Richardson v. Northeastern Ry. Co.*, L. R. 7 C. P. 75; 20 W. R. 461 (not sufficiently fastening a dog); *Stuart v. Crawley*, 2 Stark. 323 (similar case); *Harrison v. Mo. Pacific R. Co.*, 74 Mo. 364; *Indianapolis, &c. R. Co. v. Allen*, 31 Ind. 394; *Kinnick v. Chicago, &c. R. Co.*, 69 Iowa, 665; 27 Am. & Eng. R. Cas. 55; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343; *Sturgeon v. St. Louis, &c. R. Co.*, 65 Mo. 569. This included the duty of throwing water over hogs to keep them from becoming overheated. *Cragin v. N. Y. Central R. Co.*, 51 N. Y. 61; *Toledo, &c. R. Co. v. Thompson*, 71 Ill. 434.

² *South, &c. R. Co. v. Heinlein*, 52 Ala. 606; 23 Am. Rep. 578; *Cragin v. N. Y. Central R. Co.*, 51 N. Y. 61; *Louisville, &c. R. Co. v. Trent*, 11 Lea (Tenn.), 82; 16 Am. & Eng. R. Cas. 170; *McAlister v. Chicago, &c. R. Co.*, 74 Mo. 351; 7 Am. & Eng. R. Cas. 373; *Newby v. Chicago, &c. R. Co.*, 19 Mo. App. 391 (injury while loading); *Mitchell v. Georgia, &c. R. Co.*, 68 Ga. 644.

³ *East Tenn., &c. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *South, &c. R. Co. v. Heinlein*, 52 Ala. 606; 23 Am. Rep. 578; *Georgia, &c. R. Co. v. Beattie*, 66 Ga. 438; *St. Louis, &c. R. Co. v. Lesser*, 46 Ark. 236; *White v. Winnissimmet Co.*, 7 Cush. (Mass.) 155; *Wilson v. Hamilton*, 4 Ohio St. 722. But even in such a case the company is not relieved from liability for injuries caused by the improper negligent construction of the car. *Rhodes v. Louisville, &c. R. Co.*, 9 Bush (Ky.), 688; *Hawkins v. Gt. Western R. Co.*, 17 Mich. 57; 18 Mich. 427. See also *Moulton v. St. Paul, &c. R. Co.*, 31 Minn. 85.

⁴ *Bryant v. Southwest R. Co.*, 68 Ga. 805; 6 Am. & Eng. R. Cas. 388; *Wabash, &c. R. Co. v. Pratt*, 15 Ill. App. 177; *Porterfield v. Humphreys*, 8 Humph. (Tenn.) 497; *Peters v. New Orleans, &c. R. Co.*, 16 La. An. 222. But the company cannot be held for failing to furnish such facilities or opportunity if no demand is made for them. *Mobile & Ohio R. Co. v. Francis* (Miss.), 9 So. Rep. 508. *Contra*, under the Georgia statute, *Nashville, &c. R. Co. v. Heggis*, 86 Ga. 210.

venient to the usual and accessible means of unloading, if practicable, and for a failure so to do it was liable.¹

In the absence of a special contract there is no absolute duty resting upon a common carrier to deliver goods intrusted to him, within what would be, under ordinary circumstances, a reasonable time; he may excuse delay by accident or misfortune, not inevitable or produced by the act of God, but the result of the conduct of men; all that can be required of him is that he exercise due care and diligence to guard against delay and to forward the goods to their destination, and in this respect a railroad company stands upon the same footing as other carriers.²

SEC. 452 c. Freight awaiting Delivery: Notice to Consignee.— From the nature of the facilities employed by railway companies in transportation, it is not practicable to make a personal delivery to the consignee; all that can be expected or required is that they shall provide suitable warehouses at their stations, and there deposit the goods in safety to remain until they are called for. An important question which has arisen in this connection is as to the duty of the company to notify the consignee of the arrival of the freight. In an early case in Massachusetts, this was considered at some length by SHAW, C. J., delivering the opinion of the court, and the doctrine was

¹ *Bills v. N. Y. Central R. Co.*, 84 N. Y. 5.

² *Geismar v. Lake Shore, &c. R. Co.*, 102 N. Y. 653. In this case it appeared that plaintiff delivered to defendant company certain live stock to be transported over its road. In an action to recover damages for injuries caused by the alleged failure of the defendant to transport the animals within a reasonable time, it appeared that they were carried with reasonable dispatch as far as C., a station on defendant's road, where the train carrying them stopped for the purpose of making certain usual changes. Defendant was willing and desirous to proceed, and had the necessary rolling-stock and employes so to do, and made all reasonable efforts to that end, but was prevented by a portion of its employes who had struck, because of a reduction of wages, and who not only refused to run defendant's trains or obey the orders of its officers, but by violence and intimidation prevented other employes, who were ready and willing to work, from

so doing. In consequence the train was delayed for eleven days when the strike ceased, and the stock was immediately sent forward to its destination. The court charged, in substance, that defendant was not relieved from liability by the fact that the delay was caused by the unlawful acts of its striking employes. Held, error, that when the men abandoned defendant's employment, they ceased to be its servants or agents for whose acts it was responsible; that conceding the strike was organized while the strikers were in defendant's employ, it was a matter outside of their employment and imposed no liability on defendant; also, that the delay was not caused by the strike, *i. e.*, the refusal of the men to work, but by the unlawful conduct of the strikers after they had left the defendant's employ. *Geismar v. Lake Shore, &c. R. Co.*, 102 N. Y. 563, *reversing* 34 Hun (N. Y.), 50, and *distinguishing* *Weed v. Panama R. Co.*, 17 N. Y. 362; *Blackstock v. New York, &c. R. Co.*, 1 Bosw. 77; *affirmed* 20 N. Y. 48.

announced that it was no part of the carrier's duty to give such a notice.¹ The fact that it was the usage for consignors to notify their consignees by mail of the sending of the goods, and that it was a matter of no great difficulty for the consignee to know approximately when he ought to call for his consignment, was sufficient, the court considered, to remove the necessity of imposing on the company the duty of giving notice. This case has been several times approved in Massachusetts, and has been followed in Alabama, California, Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, Pennsylvania, South Carolina, and Tennessee,² though in this last

¹ *Norway Plains Co. v. Boston, &c. R. Co.*, 1 Gray (Mass.), 263. See also *Thomas v. Boston, &c. R. Co.*, 10 Met. (Mass.) 472.

² *South & N. Ala. R. Co. v. Wood*, 66 Ala. 167; 9 Am. & Eng. R. Cas. 419; *Alabama, &c. R. Co. v. Kidd*, 35 Ala. 209; *Mobile, &c. R. Co. v. Prewitt*, 46 Ala. 63; *Kennedy v. Mobile, &c. R. Co.*, 74 Ala. 430; 21 Am. & Eng. R. Cas. 145; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268 (rule otherwise now by statute, see *post*, p. 1935, *n.* —); *Southwestern R. Co. v. Felder*, 46 Ga. 433; *Rome, &c. R. Co. v. Sullivan*, 14 Ga. 277; *Porter v. Chicago, &c. R. Co.*, 20 Ill. 407; *Chicago, &c. R. Co. v. Scott*, 47 Ill. 132; *Merchants' Despatch Co. v. Halleck*, 64 Ill. 284; *Rothschild v. Mich. Central R. Co.*, 69 Ill. 164; *Bauseuner v. Toledo, &c. R. Co.*, 25 Ind. 434; *Chicago, &c. R. Co. v. McCool*, 26 Ind. 140; *Mohr v. Chicago, &c. R. Co.*, 40 Iowa, 579; *Francis v. Dubuque, &c. R. Co.*, 25 Iowa, 60; *Gashweiler v. Wabash, &c. R. Co.*, 83 Mo. 112; 25 Am. & Eng. R. Cas. 403; *Rankin v. Pacific R. Co.*, 55 Mo. 168; *Cramer v. Express Co.*, 56 Mo. 528 (*compare* *Wilson Sew. Mach. Co. v. Louisville, &c. R. Co.*, 71 Mo. 203); *Neal v. Wilmington, &c. R. Co.*, 8 Jones L. (N. C.) 482; *McCarthy v. New York, &c. R. Co.*, 30 Penn. St. 247; *Schenck v. Propeller Co.*, 60 Penn. St. 109; *Union Express Co. v. Ohleman*, 92 Penn. St. 523. Even in these States the rule is changed where the goods arrived out of time and the consignee had been active in endeavoring to find them or to ascertain the probable time of their arrival, and no notice of their arrival was given. *Francis v. Dubuque, &c. R. Co.*,

25 Iowa, 60; *Tanner v. Oil Creek R. Co.*, 53 Penn. St. 411. The Alabama court occupies somewhat of a medium ground. In *Louisville & N. R. Co. v. Oden*, 80 Ala. 41, CLOPTON, J., speaking for the court, said: "The rule, as settled in this State, is that the consignee is allowed a reasonable time to remove the goods after they arrive at the place of destination, and if not present on their arrival, the company may deposit them in its depot or warehouse for safe keeping without additional charge, until such reasonable time expires. Until the consignee has had a reasonable opportunity to remove the goods, the liability of the railroad company as a carrier continues; but on his failure to do so, the company is responsible thereafter only as a warehouseman or keeper for hire." The court also held that a stipulation in the bill of lading that the company should be liable only as a warehouseman after the arrival of the freight at its destination, and that the consignee should receive and take it away as soon as it was ready for delivery, without providing for notice to the consignee, was unreasonable and void. See also *Louisville, &c. R. Co. v. McGuire*, 79 Ala. 395. But in the first case above cited (66 Ala. 167), the court distinctly held that no notice to the consignee was necessary.

See, in this connection, *Galveston, &c. R. Co. v. Smith*, 81 Tex. 479; *Wald v. Louisville, &c. R. Co. (Ky.)*, 18 S. W. Rep. 850. These two cases apply the Massachusetts doctrine to cases where a passenger's trunk was left at the station; in such cases the reasons for the New Hampshire rule clearly has no application.

State, as well as in others, the notice is now required by statute. This statutory requirement, however, does not affect the rule that the company's liability as a common carrier ceases upon the safe storage of the consignment in its warehouse.¹

When the question as to notice to the consignee came up before the Supreme Court of New Hampshire, the correctness of the Massachusetts doctrine was denied, and the doctrine set up that the company continues liable as a common carrier until the consignee has been notified of the arrival of the goods, and has had a reasonable time and opportunity to call for the goods, to examine them, and to take them away. The court, in an opinion by SAWYER, J., advanced very plausible reasons to sustain its views, dwelling upon the fact that the same rule of public policy which made the carrier an insurer during the transit, required that he should be so liable until the consignee had had an opportunity to take possession.² Such reasonable time and opportunity for calling for and removing the goods is not, however, to have reference to the peculiar situation and circumstances of the consignee, but is to be such as would give to a person residing in the vicinity of the place of delivery, and informed of the usual course of business on the part of the servants of the company in unloading cars and delivering goods of that character, a reasonable opportunity within the usual business hours for the delivery of such goods, to call for them, and examine, and take them away.³ The views expressed in this case have been followed in Kansas, Kentucky, Louisiana, Michigan, New Jersey, New York, Ohio, Vermont, and Wisconsin, and, before the passage of the statute requiring notice, in Tennessee.⁴ The English cases have been cited both

¹ *Butler v. East Tennessee, &c. R. Co.*, 8 Lea (Tenn.), 32. "The liability of the company as a common carrier," said the court, "ceased when the trunk was deposited in the warehouse. The subsequent loss by fire, without any fault on the part of the company, would fall upon the owner of the goods." *Citing Express Co. v. Kaufman*, 12 Heisk. (Tenn.) 161; *Rankin v. Memphis Packet Co.*, 9 Heisk. (Tenn.) 564, 570. The California statute requires such a notice. It is held that if the notice is given, the liability of the company from that time on is that of a warehouseman; but that a failure to give the notice renders it liable as a common carrier until the consignee has had time and

opportunity to remove the goods. *Wilson v. California Central R. Co.*, 94 Cal. 166.

² *Moses v. Boston, &c. R. Co.*, 32 N. H. 523; 64 Am. Dec. 387.

³ *Moses v. Boston, &c. R. Co.*, 32 N. H. 523; 64 Am. Dec. 387.

⁴ *Leavenworth, &c. R. Co. v. Maris*, 16 Kan. 333; *Jeffersonville, &c. R. Co. v. Cleveland*, 2 Bush (Ky.), 468; *Maignan v. Railroad Co.*, 24 La. An. 333; *Buckley v. Gt. Western R. Co.*, 18 Mich. 121 (in this case the court held squarely in favor of the New Hampshire rule that the company is liable as a common carrier until the consignee has had a reasonable opportunity to remove the goods; in a previous case, *McMillan v. Mich. Southern R. Co.*,

ways; but it is believed that the prevailing rule there is that held by the Massachusetts Court.¹

The general doctrine is that the company is liable as a common carrier, and not as a warehouseman, for goods transported over its line and stored in its terminal warehouse awaiting delivery to the connecting line, or to an intermediate consignee.² And this applies even when the company's charter specifically provides that it shall be liable only as a warehouseman for goods stored in any of its depots "awaiting delivery;" the quoted term is construed as not embracing the case of goods awaiting farther transportation.³

SEC. 453. Who may sue for Loss or Injury. — In the absence of an express contract, it is presumed that the carrier is employed by the person at whose risk the goods are carried, — that is, the person whose goods they are, and who would suffer if they were lost.⁴ If there

16 Mich. 79, the court had been evenly divided; but in the Buckley case, the New Hampshire rule was definitely established); *Pinney v. St. Paul, &c. R. Co.*, 19 Minn. 251; *Derosia v. Winona, &c. R. Co.*, 18 Minn. 133; *Morris, &c. R. Co. v. Ayers*, 29 N. J. L. 393; *Mills v. Michigan Central R. Co.*, 45 N. Y. 622; 6 Am. Rep. 152; *Tarbell v. Shipping Co.*, 110 N. Y. 170; *reversing* 21 J. & S. 190; *McKinney v. Jewett*, 90 N. Y. 267; *Hedges v. Hudson River, &c. R. Co.*, 49 N. Y. 223; *McDonald v. Western R. Co.*, 34 N. Y. 497; *Fenner v. Buffalo, &c. R. Co.*, 44 N. Y. 504; 4 Am. Rep. 709; *Pelton v. Rensselaer, &c. R. Co.*, 54 N. Y. 214; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Hirsch v. Quaker City*, 2 Disney (Ohio), 144; *Spears v. Spartansburgh, &c. R. Co.*, 11 S. C. 158; *Dean v. Vacaro*, 2 Head (Tenn.), 490; *Rankin v. Memphis Packet Co.*, 9 Heisk. (Tenn.) 564; *Butler v. East Tenn., &c. R. Co.*, 8 Lea, 32; 9 Am. & Eng. R. Cas. 249; *Quimit v. Henshaw*, 35 Vt. 604 (rule applied to passenger's trunk); *Blumenthal v. Brainerd*, 38 Vt. 402; *Winslow v. Vermont, &c. R. Co.*, 42 Vt. 700; *Wood v. Crocker*, 18 Wis. 345; *Lemke v. Chicago, &c. R. Co.*, 39 Wis. 449. "When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them." *Sherman v. Hudson River R. Co.*, 64 N. Y. 254.

The doctrine, as stated by THOMPSON,

J., in *Pindell v. St. Louis, &c. R. Co.*, 41 Mo. App. 85, is that the railroad company ceases to be liable as a common carrier and assumes only the liability of a warehouseman if, after the arrival of the goods at their destination, he notifies the consignee of their arrival and places them in a reasonably safe place, regard being had to their character; to await the action of the consignee in taking possession of them. It is not necessary that the carrier should in such case notify the consignee of the place of the storage of the goods, but only that there should be such notice of the arrival of the goods, and that the carrier should hold itself in readiness to inform the consignee of the place of storage upon application therefor.

¹ *Shepherd v. Bristol, &c. Ry. Co.*, L. R. 3 Exch. 189 (MARTIN, B., dissenting). See Redman's Law of Ry's, p. 104.

² *Mills v. Mich. Central R. Co.*, 45 N. Y. 622; 6 Am. Rep. 152; *Mich. Central R. Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318.

³ *Mich. Central R. Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318. But the Michigan court takes a view directly opposed to that of the above cases, and holds that under such a charter provision the company is only liable as a warehouseman. *Mich. Central R. Co. v. Lantz*, 32 Mich. 502, 509; *Mich. Central R. Co. v. Hale*, 6 Mich. 243.

⁴ *Dacey's Parties to Actions*, 87; *Mobile, &c. R. Co. v. Williams*, 54 Ala. 168.

has been a valid sale of the goods by the consignor to the consignee, the former acts merely as the agent of the latter in delivering them to the carrier, and they are from that time at the risk of the consignee; and if lost or injured, the latter is the proper person to sue the carrier therefor,¹ even though the freight was prepaid by the consignor.² If, however, the property in the goods has not passed from the consignor, as, if they are sent subject to approval, the consignor must sue;³ or if the sale is not binding on the consignee by reason of non-compliance with the statute of frauds.⁴ Where goods are misdelivered, the consignor is the proper person to sue, unless the property in the goods has passed to the consignee;⁵ and the same is also the rule when the consignee cannot be found, or where the goods have been sent upon a fraudulent order.⁶ If the consignor has contracted with the consignee to deliver the goods to him at the termination of the transit, the consignor only can sue; but if he has merely contracted to deliver them on board the cars, the property in the goods vests in the consignee when the goods are delivered to the carrier, and he alone can sue for their loss, or for an injury thereto.⁷

If the separate property of two persons has been shipped in the same package, in case of loss it has been held that they may join in an action therefor.⁸ A special property in goods has been held sufficient to uphold an action. Thus, it has been held that a laundress may sue a carrier for the loss of linen returned by her through a carrier, the ground being that she is liable to the owner for the loss, and is therefore damaged to the extent of the value of the linen.⁹ If the goods were carried under a special contract between the company and one of the parties, the party to the contract should sue.¹⁰

SEC. 454. Damages recoverable. — An action for damages for the loss of goods shipped over the carrier's line is one *ex contractu*; it arises out of the breach of the contract to carry safely, and the dam-

¹ Dawes v. Peck, 8 T. R. 330; Cork Distilling Co. v. Great Southern, &c. Ry. Co., 7 H. L. 269; Penn. Co. v. Holderman (Ind.), 1 Am. & Eng. R. Cas. 285.

² King v. Meredith, 2 Camp. 639.

³ Swain v. Shepherd, 1 M. & R. 223; Finn v. Western R. Co., 112 Mass. 524.

⁴ Coates v. Chaplin, 3 Q. B. 483; Coombs v. Bristol, &c. Ry. Co., 3 H. & N. 510.

⁵ Hoare v. Great Western Ry. Co., 25 W. R. 631.

⁶ Hough v. London, &c. Ry. Co., L. R. 5 Exchq. 51.

⁷ Dunlop v. Lambert, 6 Cl. & F. 600; Davis v. James, 5 Burr. 2680; Moore v. Wilson, 1 T. R. 659.

⁸ Metcalf v. London, &c. Ry. Co., 4 C. B. N. s. 317.

⁹ Freeman v. Birch, 3 Q. B. 492, n.

¹⁰ Redman on Railway Carriers, 147.

ages are therefore to be confined to such as are ordinarily recoverable for a breach of contract. The law implies an undertaking on the part of the carrier to insure a safe transportation and delivery; but this implication of law is merely a part of the contract, and a failure to discharge confers no basis for an action *ex delicto*, unless the injury has been wilful. The case is not analogous to actions by passengers for personal injuries.

The rule was laid down in an early case, *Hadley v. Baxendale*,¹ and has been adhered to ever since, that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In that case the owners of a flour mill sent a broken shaft to an office of defendants, who were common carriers, to be conveyed by them, and defendant's clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately. The delivery of the broken shaft to the consignee, to whom it had been sent as a pattern by which to make a new shaft, was delayed for an unreasonable time, in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were consequently unable to operate their mill from want of the new shaft, thereby incurring considerable loss of profits which they would otherwise have made. The court held that the damages recoverable could not include the profits which plaintiffs would have made from the operation of their mill, because "such a loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."²

Whenever the goods are lost, the shipper is entitled to recover as damages their full value at the place to which they are consigned at

¹ 9 Exch. 341.

² *Hadley v. Baxendale*, 9 Exch. 341. A very common class of cases, involving an application of the rule of damages laid down in this case, is seen in actions against

telegraph companies for damages for failure or delay in the delivery of a message. See these cases examined *in extenso* in the article, "*Telegraphs and Telephones*," in the *Am. & Eng. Ency. of Law*.

the time when they should have arrived there,¹ less the amount of freight, unless it has been paid in advance. If the goods have no market value at the place of delivery, then the cost of the goods, and the expense of transit, or in other words the actual value of the goods is the measure of recovery.² If the value of the goods was stated by the consignor to the carrier to be a certain sum, no greater sum can be recovered, as he is bound by his valuation.³ But as has been seen, the carrier cannot limit his liability for negligence by himself placing an arbitrary value upon the goods.⁴ If the goods are only partially destroyed, or are injured, the difference between their value at the place of delivery at the time and in the condition in which they ought to have arrived, and their value at the time and in the condition in which they did arrive, is the measure of recovery.⁵ But where in such cases the consignee expends labor and money in order to render the damaged goods salable, he is entitled to recover compensation for such expense in addition to the difference in value. The expense enured to the benefit of the carrier, and must be charged to him as proximately connected with the actual injury to the goods.⁶ The same principle applies where the shipper incurs expenses in endeavoring to reclaim the goods.⁷ Ordinarily the consignee cannot refuse to receive the goods merely because they are damaged; he must take them as they are, and rely on his action to recover for the damage suffered.⁸ But where the article is practically worthless, and so injured that it would cost the price of a new one to repair it, he may refuse to receive it, and recover as for an entire loss.⁹

¹ *Rice v. Baxendale*, 7 H. & N. 96; *Brandt v. Bawlby*, 2 B. & Ad. 932.

² *British Columbia Saw Mill v. Nettleship*, L. R. 3 C. P. 499; *O'Hanlan v. Great Western Ry. Co.*, 6 B. & S. 484.

³ *McCanee v. London, & Ry. Co.*, 3 H. & C. 343; *Maguire v. Dinsmore*, 62 N. Y. 35.

⁴ *Atchison, & C. R. Co. v. Miller*, 16 Neb. 661; 18 Am. & Eng. R. Cas. 545; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.

⁵ *Collard v. Southeastern Ry. Co.*, 7 H. & N. 79; *Missouri Pac. R. Co. v. Breeding* (Tex.), 16 S. W. Rep. 184; *Smith v. New Haven, & C. R. Co.*, 12 Allen (Mass.), 531; *Ingledew v. Northern R. Co.*, 7 Gray (Mass.), 86; *Estil v. Railroad Co.*, 41 Fed. Rep. 849; *Baltimore, & C. R. Co. v. Pumphrey*, 59 Md. 390;

Peet v. Chicago, & C. R. Co., 20 Wis. 594; *Sisson v. Cleveland, & C. R. Co.*, 14 Mich. 489; *Rome R. Co. v. Sloan*, 39 Ga. 636.

⁶ *Winne v. Ill. Central R. Co.*, 31 Iowa, 584.

⁷ *North, & C. R. Co. v. Akers*, 4 Kan. 453; *Farwell v. Davis*, 66 Barb. (N. Y.) 73.

⁸ *Gulf, & C. R. Co. v. Booton* (Tex.), 15 S. W. Rep. 502; *St. Louis, & C. R. Co. v. Mudford*, 44 Ark. 439; *Scoville v. Griffith*, 12 N. Y. 509; *Gulf, & C. R. Co. v. Jackson* (Tex.), 15 S. W. Rep. 128.

⁹ *Thomas, & C. Co. v. Wabash, & C. R. Co.*, 62 Wis. 642. Where one delivered goods at C. to be carried to S., and was told by the booking-clerk that the transit would take two days, and two days after, he called at S. and was told they had not arrived, and he received the same answer

The value of the goods, if destroyed, or the decrease in value, if they are damaged, is always recoverable if the carrier is liable at all. The trouble as to the measure of damages comes in where the shipper claims damages for a loss of profits, or for similar losses consequent upon the delay, damage, or destruction of his goods. Here the rule of *Hadley v. Baxendale* is the only test which can be applied. If the damages consequent upon the delay, etc., are such as may fairly be considered to have been in contemplation of both parties, at the time they made the contract, as a probable consequence of a breach of it, then they are a proximate consequence of the breach of contract, and are recoverable. Special circumstances existing at the time the contract was made cannot be allowed to affect the measure of damages unless it is shown that they were communicated to the other party.¹ Thus, where plans for building a house were lost in transit, the carrier not having been informed of what they were, nor to what use they were to be put, the measure of damages is the cost of new plans and the expense incurred in securing them, but not the loss from the delay in building the house.² And where a plan and model were sent to a certain place to compete for a prize, the proper measure of recovery was held to be the value of the labor and materials expended in making the article; and damages for the loss of the opportunity to compete for the prize were held too remote for consideration.³ If there has been a delay in delivering, which amounts to a breach of contract, it seems that nominal damages are recoverable, although damages are proved.⁴ But if the plaintiff has sustained actual damage, he is not always entitled to recover the full amount. Thus, where there has been an unreasonable delay in the delivery of goods, the damages *prima facie* would be the difference in the value of the

on several occasions during the nine days following, — it was held that he was entitled to throw the goods on the hands of company and sue for the value. *Levene v. Gt. Western Ry. Co.*, 18 L. T. N. S. 295.

¹ *Hadley v. Baxendale*, 9 Exch. 341. A commercial traveller delivered a parcel of samples to a carrier to be carried to A., but did not state the contents of the package or the purpose for which it was required. By the negligence of the carrier, the delivery of the parcel was delayed and the traveller spent three days at A. unemployed, waiting for it. In an action against the carrier for negligence, in which the hotel expenses

of the traveller during the time he was waiting for the parcel were claimed as damages, it was held that such damages were too remote and could not be recovered. *Woodger v. Gt. Western Ry. Co.*, L. R. 2 C. P. 318; 15 W. R. 383.

² *Mather v. American Express Co.*, 138 Mass. 57.

³ *Lythgoe v. East Anglia Ry. Co.*, 15 Jurist, 400. See *W. U. Telegraph Co. v. Crall*, 39 Kan. 580 (no damages recoverable for the possibility that a horse would have won a race).

⁴ *Robinson v. Great Western Ry. Co.*, 35 L. J. C. P. 123; *Roberts v. Midland Ry. Co.*, 25 W. R. 323.

goods at the place of destination at the time they ought to have been delivered, and their value at the time when they are delivered in fact.¹ Any loss above this difference sustained by the plaintiff, not from the delay alone, but out of his own special arrangements or circumstances, cannot be recovered in the absence of a special contract, express or implied. But if the intended use and application of the goods to be carried was expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of both parties to the contract, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract.² It is clear the company may refuse to accept the goods on the basis of such a special liability, but if they accept without objection they acquiesce in the liability. But merely labelling goods as "travellers' goods" was held not to affect a company with notice, so as to make them liable for special damages for delay in the delivery.³

In many cases of claim for loss of market, the company have constructive notice from the apparent nature of the goods, their destination, or from previous dealings that they are being sent to a particular market, and therefore they are clearly bound to recompense the owner the reasonable loss flowing from his being disappointed of the market; and where the customer stipulates that the goods shall be sent the same evening, a special contract is created, and the company may be sued for the breach of it.⁴

Where the delivery of a shaft was delayed an unreasonable time, by which a mill was stopped, it was held that inasmuch as the

¹ *Horn v. Midland Ry. Co.*, L. R. 8 C. P. 131.

² *Simpson v. London, &c. Ry. Co.*, L. R. 1 Q. B. D. 274. In this case the plaintiff was a dealer in cattle-spice, and was in the habit of going about to agricultural shows exhibiting samples, and having exhibited them at a show at B., was desirous of exhibiting them at another show at N., the defendant railway company had a special office in the show-ground at B. for the purpose of receiving and forwarding exhibited goods, and the plaintiff's agent delivered his wares to the defendant's clerk, who supplied a blank consignment-note, which was filled up by the plaintiff's

agent, describing the goods as "sundries," addressed to the N. show-ground and indorsed "must be delivered on Monday certain." The goods not having been delivered on Monday, nor in time for the show, it was held that the plaintiff was entitled to recover the damages resulting from the defendant's failure to deliver in time, — namely, his expenses and loss of profits. *Simpson v. London, &c. Ry. Co.*, 1 Q. B. D. 174.

³ *Candy v. Midland Ry. Co.*, 38 L. T. N. s. 226.

⁴ *Pickford v. Grand Junction Ry. Co.*, 12 M. & W. 766.

carrier had no notice that the profits of the mill would be thereby stopped, he would not be liable for the loss thereof.¹ And where the plaintiff, a clothier, sent a parcel of goods to his traveller at C., without notice to the company of the object for which the goods were sent, and their delivery was, through the company's negligence, delayed until after the traveller left C., and the plaintiff in consequence lost the profits which he would have derived from sales at C., it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover such profits as damages for the delay.²

In an action for delay in delivering skins for making gloves, the plaintiff was held not entitled to recover the loss in wages paid to workmen kept idle in consequence of their non-arrival.³ So a commercial traveller was not allowed his hotel expenses during two days which he had been delayed by the non-arrival of his case of goods sent by luggage train without any intimation of any kind respecting it;⁴ but reasonable costs incurred in searching and inquiring for the goods would be recoverable.⁵ No damages can be recovered which are incapable of being specifically stated and appreciated, as for instance, any inconvenience or vexation the plaintiff may have suffered.⁶

¹ *Hadley v. Baxendale*, 9 Exch. 341.

² *Great Western Ry. Co. v. Redmayne*, L. R. 1 C. P. 329.

³ *Le Peintur v. Southeastern Ry. Co.*, 2 L. T. N. s. 170.

⁴ *Woodger v. Great Western Ry. Co.*, L. R. 2 C. P. 318.

⁵ *Hales v. London, &c. Ry. Co.*, 4 B. & S. 66. In *Gee v. Lancashire, &c. Ry. Co.*, 6 H. & N. 211, the plaintiffs were not allowed to recover loss of wages paid to work-people, and of profits they would have made, in consequence of their mill being stopped through failure of the company to deliver cotton within their usual time; for though they had communicated the fact of their mill being stopped, in consequence of non-delivery to the servants of the company at the place of destination, they had not done so at the time and place of delivery. In *Wilson v. Lancashire, &c. Ry. Co.*, 9 C. B. N. s. 632, where an action was brought against a company for damage for loss sustained by delay in delivery of cloth, by which the plaintiff, who was a cap-maker, lost the season for making it into caps, and so disposing of it, — it was

held that although the plaintiff could not recover his loss of profits, yet the jury might take into consideration the deterioration in the marketable value of the cloth by reason of the season having passed for making caps. In *Crouch v. Great Northern Ry. Co.*, 11 Exchq. 742, where a company refused to carry, at the ordinary rate, packed parcels for a carrier, whereby he was obliged to send them a more circuitous route at a greater expense, it was held that he was not entitled to recover damages for alleged loss of business, as the declaration was framed; but, *per MARTIN, B.*, if the fact had been that the plaintiff was a carrier whose business consisted in collecting goods to be forwarded by the defendants' railway, and the defendants designedly refused to carry his goods, which they were bound by law to do, in order to obtain a monopoly and destroy the plaintiff's business, — under such circumstances a jury would be justified in giving very heavy damages.

⁶ *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408; *Hobbs v. London, &c. Ry. Co.*, L. R. 10 Q. B. 111.

But while the market value at the time and place of delivery, together with proper consequential damages, is the usual measure of damages where goods are lost, the rule does not afford an invariable standard. Thus where goods which possess a peculiar value to the owner, and which can have no market value, as for example, family photographs and the like, are lost, the "just rule of damages is the actual value to him who owns them, taking into account their cost, the practicability and expense of replacing them, and such other consideration as, in the particular case, affects its value to the owner."¹ Just compensation to the owner for the actual loss sustained by him is the basis of all the rules for determining the measure of damages, and where peculiar circumstances exist where the market value affords no evidence of the loss to the owner, the jury must determine what is a proper compensation under all the circumstances.²

Where there is a refusal to deliver, without cause, it amounts to a conversion, and the measure of damages is the value of the goods when converted.³ If the goods are delivered at the wrong destination, the measure of damages is the difference in their value at their destination, and that at the place where they were actually delivered, or the expense and damages necessarily incurred in bringing them to their original and proper destination.⁴

If the goods were intended for immediate sale at the point to which they were shipped, the measure of damage for a delay is the difference between the market price when they were delivered, and

¹ *Green v. Boston, &c. R. Co.*, 128 Mass. 221; *Stickney v. Allen*, 10 Gray (Mass.), 352; *Houston, &c. R. Co. v. Burke*, 55 Tex. 323; 9 Am. & Eng. R. Cas. 59, 369.

² In a case in Texas, involving a similar question, the court said: "The lost articles seemed to be of such a character — viz., second-hand clothing, books, and table furniture which had been used by the plaintiff — that they could not be said to have to him a value at one place different from that they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which the measure of damages rests, it would seem that the

value of such goods to their owner would furnish the proper rule upon which he should recover. Not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money which he would sustain by being deprived of articles so specially adapted to the use of himself and his family." *International, &c. R. Co. v. Nicholson*, 61 Tex. 550. See also *Denver, &c. R. Co. v. Frame*, 9 Col. 385; *Marsh v. Union Pac. R. Co.*, 3 McCrary (U. S.), 236; 9 Fed. Rep. 873; 6 Am. & Eng. R. Cas. 359 (loss of household goods).

³ *Loeffler v. Keokuk, &c. R. Co.*, 7 Mo. App. 185.

⁴ *Galena, &c. R. Co. v. McCrae*, 18 Ill. 488.

that when they should have been delivered, together with interest.¹ In addition, such incidental damages may be recovered as necessarily attended the delay, as where the plaintiff incurred expense and loss of time in searching for the goods and endeavoring to trace them up, etc.² Where special circumstances exist of which the carrier was informed they may be considered. Thus, where the shipper had made an advantageous sale of the goods, provided they should be delivered within a certain time, and through the carrier's delay this bargain is lost, the measure of recovery is the difference between the *price contracted for* and the actual market value at the time and place of delivery.³ But this is only true where the carrier was informed of the circumstances, in any other case the special contract price could not be considered.⁴

In a case before the supreme court of Mississippi,⁵ the ground of the action was that the carrier had, without cause, delayed the transportation and delivery of a part of the machinery of a saw-mill, for the want of which the mill had to lay idle, and the profits which would have been derived from its operation were thus lost. The court dwelt on the impossibility of stating any fixed rules by which in every case the measure of damages may be determined, but after affirming the principles stated in *Hadley v. Baxendale*, stated the further propositions that, (1) "Losses of profits in a business cannot be allowed unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice either from the nature of the contract itself, or by explanation of the circumstance at the time the contract was made, that such damage

¹ *Ingledeu v. Boston, &c. R. Co.*, 7 Gray (Mass.), 86; *Ward v. Railroad Co.*, 47 N. Y. 29; *Peet v. Chicago, &c. R. Co.*, 20 Wis. * 594; *Collard v. Southeastern Ry. Co.*, 7 H. & N. 79; *Columbus, &c. R. Co. v. Flournoy*, 75 Ga. 745.

² *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *Chicago, &c. R. Co. v. Stanbro*, 87 Ill. 195; *Ayres v. Chicago, &c. R. Co.*, 75 Wis. 215; *Laurent v. Vaughn*, 30 Vt. 90.

³ *Deming v. Grand Trunk R. Co.*, 48 N. H. 45; *St. Louis, &c. R. Co. v. Mudford*, 48 Ark. 50.

⁴ *Gulf, &c. R. Co. v. Cole* (Tex.), 16 S. W. Rep. 176; *Scott v. Steamship Co.*, 106 Mass. 468. In *Horn v. Midland Ry. Co.*, 42 L. J. C. P. 59, L. R. 8 C. P. 131, the

plaintiff had a contract to deliver goods in London, at a given date, at an exceptionally high price. Notice was given to the station-master that they must be delivered at the given date, and if not so delivered, they would be thrown on the plaintiff's hands; but nothing was said about the exceptional character of the contract, or the unusually high price of the goods. The company failing to deliver within the time, it was held that they were not liable for the profit lost by the plaintiff under his contract by the exceptional price of the goods.

⁵ *Vicksburg, &c. R. Co. v. Ragsdale*, 46 Miss. 483, 484.

would ensue from non-performance. (2) If the contract was made with reference to embarking in a new business (such as sawing lumber for the market), the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damage. (3) If the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, — such as the value of the use of the machinery, to be tested by its rental price, or other approximate means; the expense of idle hands; the loss of gain on work contracted to be done for another person, if such work could have been done had the machinery been delivered, and the gain thereby definitely ascertained in proper time. (4) The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself and thereby reduce his losses and diminish the responsibility of the party in default to him.”¹

The cases decided on claims for consequential loss seem to have established the following principles: that damage beyond the difference in market values will not be allowed unless the consequences of delay are communicated to or known by the company at the time and place of delivery to them; that only such loss can be recovered as was reasonably contemplated by both parties at the time the contract for carriage was made, and not loss arising out of circumstances then wholly unknown to the company; that damages will be given only for the reasonable and proximate, and not for the remote consequences of the breach of contract.²

¹ The principles thus so clearly stated have been often applied. See *Pacific Express Co. v. Darnell*, 62 Tex. 639; *Baltimore, &c. R. Co. v. Pumphrey*, 59 Md. 390; *Griffin v. Colver*, 16 N. Y. 489; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455; *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131; where there is a delay in the delivery of a “worm” for a distillery, the consignee may recover the value of the

crude turpentine which overflowed the boxes made to catch it, and was thus lost, the owners having no barrels in which to store it, and not being able to manufacture it owing to the absence of the “still-worm.” *Savannah, &c. R. Co. v. Pritchard*, 77 Ga. 412.

² *Redman on Railway Carriers*, pp. 157 *et seq.*

CHAPTER XXIX.

MORTGAGES, BONDS, ETC.

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SEC. 455. **Power to make Mortgages, etc., restricted.** — It is now well settled that, without legislative authority, a railway company has no power to transfer its franchises, either absolutely or by way of mortgage,¹ or its railway or "permanent plant,"² because this

¹ *Troy, &c. R. Co. v. Kerr*, 17 Barb. 581; *Randolph v. Wilmington, &c. R. Co.* 11 Phila. (Penn.) 502; *Stewart's Appeal*, 56 Penn. St. 413; *Hays v. Ottawa, &c. R. Co.*, 61 Ill. 422; *Arthur v. Commercial Bank*, 11 Miss. 394; *Black v. Delaware, &c. Canal Co.*, 22 N. J. Eq. 130; *State v. Mexican, &c. R. Co.*, 3 Rob. (La.) 513; *Com. v. Smith*, 10 Allen (Mass.), 448. But authority to borrow money and issue bonds for the construction of a railroad is held to carry with it an implied power to issue a mortgage upon its franchises, and property to secure the same. *Louisville R. Co. v. Metcalfe*, 4 Met. (Ky.)

199. So a mortgage given without authority is validated by a subsequent recognition of it as a valid obligation by the Legislature. *Richards v. Merrimac, &c. R. Co.*, 44 N. H. 127; *Shepley v. Atlantic, &c. R. Co.*, 55 Me. 395; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Shrewsbury, &c. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. 113; *Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 8; *Winch v. Birkenhead, &c. Ry. Co.*, 5 De G. & S. 562; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114; *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. App. 201; *Troy, &c. R. Co. v. Boston, &c. R.*

² *Hart v. Eastern Union Ry. Co.*, 7 Exch. 246.

would enable the company to deprive itself of the power to discharge its public duties, and to transfer to another the right to exercise those functions and privileges which the Legislature had conferred upon it.¹ But while this is the rule as to all real estate acquired under the right of eminent domain, or other lands owned by it which are indispensable for the purposes of its business, yet it does not apply to lands which are acquired by it by purchase, and are not necessary for its purposes in building and operating its road.²

SEC. 456. Legislative Authority to Mortgage. — Where, as is now generally the case, the charter of these companies or the general statute confers authority upon these companies to mortgage their property and franchises for certain purposes, there can of course be no question as to their authority to mortgage; but where the authority is restricted to a certain purpose, no power exists to mortgage for any other purpose.³ And where express power to mortgage is conferred, it is said that an implied authority to mortgage for that purpose is thereby negatived;⁴ but this is hardly believed to be accurate,⁵ unless the statute expressly or by clear inference

Co., 86 N. Y. 107. But in some of the States it is held that a railroad company, having the implied power to borrow money for the construction of its road, has, unless restrained by statute, authority to secure the payment thereof by a mortgage of its property. *Kelly v. Alabama, &c. R. Co.*, 58 Ala. 489; *Savannah, &c. R. Co. v. Lancaster*, 62 Ala. 555; *Com'rs, &c. v. Atlantic, &c. R. Co.*, 77 N. C. 289. Authority to make a mortgage carries with it the power to make it with the usual conditions embraced in such conveyances. *Savannah, &c. R. Co. v. Lancaster*, 62 Ala. 555. But it does not authorize unusual provisions, — as that the company shall pay the attorney-fees of the mortgagees in a suit upon the mortgage. *Pacific Rolling Mill Co. v. Dayton, &c. R. Co.*, 5 Fed. Rep. 852; 5 *Sawyer* (U. S.), 61; *Jessup v. City Bank, &c.*, 14 Wis. 331.

¹ *New Orleans, &c. R. Co. v. Harris*, 27 Miss. 517; *Pierce v. Emery*, 32 N. H. 484; *Carpenter v. Black Hawk, &c. Co.*, 65 N. Y. 43; *Wood v. Bedford, &c. R. Co.*, 8 Phila. (Penn.) 94; *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Atkinson v. Marietta, &c. R. Co.*, 15 Ohio St. 21.

² *Tucker v. Ferguson*, 22 Wall. (U. S.) 525; *Hendee v. Pinkerton*, 14 Allen (Mass.), 381; *Farnsworth v. Minnesota, &c. R. Co.*, 92 U. S. 49. There is a class of cases which hold that for the purpose of its regular business a corporation may mortgage its property; but these cases are exceptional, and are not generally followed. *Kennebec, &c. R. Co. v. Portland, &c. R. Co.*, 59 Me. 9; *Shepley v. Atlantic, &c. R. Co.*, 55 Me. 595; *White Water, &c. Canal Co. v. Vallette*, 21 How. (U. S.) 414.

³ *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 45 Fed. Rep. 518; *Frazier v. East Tenn., &c. R. Co.*, 88 Tenn. 138; *Grand Junction R. Co. v. Bickford*, 23 Grant's Ch. (Ont.) 302. See *post*, note 7, p. 1964. But where from the general tenor of the statute it is evident that the Legislature intended to authorize a railway company to mortgage *all* its property, it will be held — unless a contrary intention appears from the tenor of the mortgage itself — that it embraces all the property of the company. *Coe v. Midland, &c. R. Co.*, 31 N. J. Eq. 105.

⁴ *In re Pooley Hall Colliery Co.*, 21 L. T. n. s. 690.

⁵ *Mobile, &c. R. Co. v. Talman*, 15 Ala. 472; *Allen v. Montgomery R. Co.*, 11 Ala.

takes away such implied authority. Authority to mortgage need not be given in express terms, but may be inferred where there is a reasonable ground for such an inference.¹ Thus a power to *sell* the property is held to include the power to mortgage its property, but not its franchises.² But the question as to whether a statute which merely authorizes a corporation to mortgage its property can be said to include a right to mortgage its franchises is not definitely settled, but the better opinion would seem to be that it does not.³ But a mortgage by which a corporation undertakes to mortgage both its property and franchises may be good as to the property although invalid as to the franchises.⁴ Of course, a mortgage invalid in its inception, for want of legislative authority, may be validated by subsequent legislation to that end,⁵ as the public alone is affected by such transfer, and the Legislature has ample authority to waive it by a subsequent act.⁶

SEC. 457. Statutory Provisions. — In most of the State statutes authority is given railway companies to mortgage their property and franchises, either generally or for certain specified purposes; and where no such general provision is incorporated into the statute, it is now generally conferred by a special provision in the charter. Where this authority is conferred, subject to certain limitations or conditions, they must be fully complied with, in order to come within the authority of the statutes.

If the statute authorizing the execution of a mortgage provides that it shall not be made payable in less than a certain number of

437; *Uncas National Bank v. Roth*, 23 Wis. 339; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431.

¹ *East Boston Freight R. Co. v. Eastern R. Co.*, 18 Allen (Mass.), 422. Where the company's charter expressly authorizes it to mortgage its property, it is not necessary to the exercise of the power that it be expressly authorized to borrow money and issue bonds therefor, since that is a necessary incident of the power to mortgage. *Gloninger v. Pittsburgh, &c. R. Co.*, 139 Penn. St. 13. See also *Fidelity Ins., &c. Co. v. West Penn. R. Co.*, 138 Penn. St. 267 (validity of the sale of bonds where securities given are largely fictitious).

² *McAllister v. Plant*, 54 Miss. 106. Authority to sell or mortgage all the property of a corporation includes authority to sell or mortgage a part of it. *Pullan v.*

Cincinnati, &c. R. Co., 4 Biss. (U. S.) 35.

³ *Pollard v. Maddox*, 28 Ala. 321; *Dunham v. Isett*, 15 Iowa, 284; *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35. But see *Pierce v. Milwaukee, &c. R. Co.*, 24 Wis. 451; *McAllister v. Plant*, 54 Miss. 106.

⁴ *Central Gold Mining Co. v. Platt*, 3 Daly (N. Y. C. P.), 263; *Gloninger v. Pittsburgh, &c. R. Co.*, 139 Penn. St. 13.

⁵ *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414; *Shaw v. Norfolk Co. R. Co.*, 5 Gray (Mass.), 162; *Shepley v. Atlantic, &c. R. Co.*, 55 Me. 395.

⁶ *Hatcher v. Toledo, &c. R. Co.*, 62 Ill. 477. A mortgage of a railroad in one State is not invalid because executed in another State. *Hadder v. Kentucky, &c. R. Co.*, 7 Fed. Rep. 793.

years, a provision in the mortgage that a failure to pay the interest as it matures shall operate to make the whole mortgage payable at once, is void, because in violation of the statute which the holders of the bonds are bound to know.¹ But a provision in a mortgage that the principal shall become due, if default is made in the payment of the interest, is not invalid, merely because the act authorizing the mortgage provides that it shall be given to secure the payment of the principal at a certain time, with interest payable semi-annually.²

SEC. 458. **How Mortgages are generally made.**—Mortgages of railway property and franchises, to secure the payment of bonds or even of general indebtedness, are now almost universally made to trustees, who take and hold the title for the benefit of the bondholders or other creditors for whose benefit it was given, and the mortgage is treated as a contract between the company and all persons who then are, or thereafter may become, holders of its bonds or other obligations the payment of which it is given to secure.³ As a rule, these mortgages contain a power of sale upon a breach of the conditions, and in such cases the trustees may, where the power is expressly and definitely conferred upon them, but not otherwise, sell the property without resorting to legal proceedings;⁴ but as a rule, owing to the nature of the property, and the interests and the perils involved, a resort to a court of equity to foreclose the mortgage will be the safer and more desirable course.

Mortgages frequently provide that upon a single default in the payment of the interest, the principal of the debt shall become due, and that upon failure to make complete payment of it on demand, the mortgage may be foreclosed. But where no such provision is made, a power given by the terms of the mortgage to the trustee, after default in the payment of interest for a certain period, to take possession of the mortgaged property, and sell it, and apply the proceeds to the payment of the principal and the interest, does not accelerate the maturity of the principal so as to authorize a foreclosure for the payment of the entire debt on default of the payment of the interest.⁵

¹ Howell v. Western R. Co., 94 U. S. 462.

² Coe v. N. J. Midland R. Co., 31 N. J. Eq. 105.

³ Butler v. Rahm, 46 Md. 541.

⁴ Mason v. York, &c. R. Co., 52 Me. 82.

⁵ McFadden v. May's Landing, &c. R. Co., 49 N. J. Eq. 176. See *post*, § 462. If there is a provision in the mortgage that

SEC. 459. Defective Mortgage. — Where a railway company attempts, through its proper officers, to execute a mortgage upon its property and franchises, under a proper authority, although the instrument is not so executed that it can take effect as a deed, yet it will be treated as an equitable mortgage so as to give the holders of the obligations which it was intended to secure the full benefit of its provisions. Thus, in a Vermont case,¹ the company attempted to execute a mortgage to trustees, to secure the payment of certain bonds to be thereafter issued. The company authorized its president to execute such mortgage, which he did in his own name, and sealed it with his own seal instead of the seal of the company. A second mortgage and a third were subsequently issued to other trustees, to secure other indebtedness; and the company having made default as to the payment of the first bonds, the trustees of the first bonds brought a bill in equity to foreclose the mortgage. Thereupon the holders of the second and third mortgages, which were properly executed, intervened, and set up their claim to a prior lien upon the property, by reason of the defects in the execution of the first mortgage; but the court held that the first instrument operated as an equitable mortgage, as against the trustees of the last two mortgages, who were found to be affected with notice and knowledge of the execution and existence of the first mortgage. So it has been held that informal instruments, as bonds issued and expressly made a lien upon the property,² or a mortgage which is neither executed nor recorded according to the requirements of law, are valid as against a subsequent mortgage which is in express terms made subject to such defective mortgage.³

SEC. 460. Liens created by Statute. — A lien in the nature of a mortgage may be created by statute, and attach in favor of certain classes of indebtedness, without any writing whatever; as where the

upon the failure of the company to realize sufficient to pay the interest coupons as they mature, it may at its option issue scrip certificates in lieu thereof. A right of action to recover the amount of the coupon is *prima facie* perfect upon proof of non-payment and presentment of the coupon at the place of payment, and he is not bound to show that circumstances existed authorizing the issue of the scrip. *Marlow v. Texas, &c. R. Co.*, 19 Fed. Rep. 861.

¹ *Miller v. Rutland, &c. R. Co.*, 36 Vt. 452.

² *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414. If the mortgage is defective in any of its terms, it will be reformed upon proper application. In one case this was done so as to convey the title to the fee to the trustees, when such was the obvious intention of the mortgagors. *Randolph v. New Jersey, &c. R. Co.*, 28 N. J. Eq. 49.

³ *Coe v. Columbus, &c. R. Co.*, 10 Ohio St. 372.

statute authorizes the issue of bonds by the company, and provides that such bonds shall be a lien upon the railway and all its property and franchises. In such a case it is evident that no formal mortgage, or indeed any writing whatever, is necessary to secure the payment of such bonds, as the law has virtually made each bond a mortgage, and has dispensed with all formalities.¹ And this is so even though the bonds make no mention of a lien, and do not in any manner refer to the act under which they are issued.² But in order to operate as a lien, the statutory provision conferring it must do so clearly and expressly.³ This class of mortgages is held to cover all the "property" of the company, whether used for the construction or operation of the road or not,⁴ and also after-required property, as well as that in hand when the bonds were issued.⁵ Such a lien may be waived,⁶ but it cannot be discharged by the holder otherwise than by its payment or surrender, so as to deprive a subsequent holder of the benefit of the lien, because it is not given in favor of any particular person, *but runs with the bond* in favor of any legal holder thereof.

SEC. 461. **Who may execute Mortgage.** — If the statute authorizing the issue of a mortgage makes provision as to who shall execute it, or how it shall be executed, the statute must be followed; but where — as is usually the case — the statute is silent upon this point, the directors of the company may not only authorize the issue of a mortgage, but also may execute it, or authorize one of their number — usually the president — to execute it.⁷ The directors alone, without a vote of the stockholders, may authorize a mortgage to be made; and even though there is any question as to their authority, the validity of the mortgage, as against the corporation, is established by its affirmance of it by the issue of bonds under it.⁸

¹ Woodson v. Murdock, 22 Wall. (U. S.) 351; Wilson v. Boyce, 92 U. S. 320; Murdock v. Woodson, 2 Dill. (U. S.) 539; State v. Florida, &c. R. Co., 15 Fla. 690.

² Dundas v. Desjardins, &c. R. Co., 17 Grant (U. C.), 27.

³ Cincinnati v. Morgan, 3 Wall. (U. S.) 275; Collins v. Central Bank, &c., 1 Kelly (Ga.), 435; Brunswick, &c. R. Co. v. Hughes, 52 Ga. 557.

⁴ Wilson v. Boyce, 92 U. S. 320.

⁵ Whitehead v. Vineyard, 50 Mo. 30.

⁶ Ketcham v. Pacific R. Co., 4 Dill. (U. S.) 74.

⁷ Ohio, &c. R. Co. v. McPherson, 35 Mo. 13; Arms v. Conant, 36 Vt. 744; McCurdy's Appeal, 65 Penn. St. 290; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Wright v. Bundy, 11 Ind. 398. The mortgage should specifically and accurately describe the bonds which it is intended to secure. Butler v. Rahm, 46 Md. 541. The mortgage may be so drawn that the company may create a prior lien upon the property. But in order to retain this power, it must be specifically and clearly expressed in the mortgage. Campbell v. Texas, &c. R. Co., 2 Woods (U. S.), 263.

⁸ McCurdy's Appeal, 65 Penn. St. 290;

SEC. 462. Non-Payment of Interest. — A railway mortgage is to be construed according to its terms; and if there is a provision that, if default shall be made in the payment of principal or interest, the bonds shall become due and payable, it may be foreclosed. But if the statute under which the bonds are issued provides that the bonds shall not be payable in less than a certain period, which has not elapsed, such a provision in the mortgage would be ineffectual; but the mortgage may be foreclosed for the breach in the payment of interest, and the decree should direct a sale of the road in case the terms of the decree are not complied with; and the balance, after paying the interest and expenses, will be held by the court to pay the after-accruing principal and interest, the mortgagees having a lien upon the fund for that purpose.¹ The holders of bonds which have not matured cannot be compelled to accept the amount thereof before they mature, and neither the Legislature nor the courts can compel them to do so, or deprive them of their lien under the mortgage.²

SEC. 463. Convertible Bonds. — Where, upon the face of the bonds, there is a provision that the holder may convert the bonds into stock of the company upon certain terms, the holder may do so at his option, or he may retain his bonds and the lien under the mortgage for their payment. The right of conversion runs with the bond, and cannot be assigned except by an assignment of the bond.³ Even though the bonds do not upon their face contain any provision making them convertible, yet, if under the statute the company has authority to issue additional stock, the company may give to the bondholders the option to convert them into stock. And where convertible bonds are lawfully issued, it has been held that they may be converted into stock, even though the maximum limit of the capital stock under the charter or general law has been reached.⁴ The authority of this case has been doubted, but it would be exceedingly difficult to establish a contrary rule.

Hadder v. Kentucky, &c. R. Co., 7 Fed. Rep. 793. If the act authorizing a mortgage requires the concurrence of a majority of the stockholders, it is held that a non-compliance with this requirement is one in which the public have no interest. *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462.

¹ *Howell v. Western R. Co.*, 94 U. S. 463.

² *Randolph v. Middleton*, 26 N. J. Eq. 543.

³ *Denny v. Cleveland, &c. R. Co.*, 28 Ohio St. 108; *Sutleff v. Cleveland, &c. R. Co.*, 24 Ohio St. 147.

⁴ *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

SEC. 464. **What is covered by the Mortgage.** — The question as to what property is covered by a mortgage is purely one of construction, and depends entirely upon the language used, and the obvious intention of the parties to be gathered therefrom, and the authority under which it was issued. If the statute specifies what property may be mortgaged, of course the mortgage can embrace no other property; but as a rule, acts authorizing the issue of a mortgage by a railway company are broad enough to embrace any property which the company may own, so that the question as to what is embraced in it is usually one depending upon a fair construction of the mortgage itself, and the same rules of construction apply as are applied to the deeds of individuals. A formal mortgage is not in all cases necessary, as the Legislature may provide that certain obligations issued by a company shall be a mortgage upon its property to secure the payment of such obligations, and in that case they have all the force of a mortgage, and the act itself applied to the existing condition of the road determines the character and extent of the lien.¹ A mortgage of the property of a railroad company which is specifically designated, which also contains a clause embracing "all other corporate property, real and personal, of said railroad company, belonging or appertaining to said railroad, whether then held or owned, or thereafter acquired," was held not to apply to or embrace a tract of land afterwards acquired by the company, which was not used in connection with the road, but was laid out into town lots.² The

¹ *State v. Florida, &c. R. Co.*, 15 Fla. 690. A mortgage may cover office furniture belonging to the company. *Raymond v. Clark*, 46 Conn. 129.

² *Calhoun v. Memphis, &c. R. Co.*, 2 Flip. (U. S.) 442. In England, a mortgage of an "undertaking" does not include the land of a railway company. *Doe v. St. Helen's, &c. Ry. Co.*, 2 Eng. Ry. & Can. Cas. 756. Nor does a mortgage conveying the "said undertaking, and all and singular the rates, tolls, and other sums arising," convey the land to the mortgagee. *Myatt v. St. Helen's Ry. Co.*, 2 Q. B. 364. But where the governing body of the corporation, in a resolution authorizing an issue of bonds to raise money, provide for the execution of a deed of trust to secure the same, on its right of way, roadbed, etc., "and on all the real and personal property now and hereafter

belonging to the company," this necessarily includes the earnings and profits, and authorizes a trust deed conveying the tolls, freights, rents, incomes, etc. *Kelly v. Alabama, &c. R. Co.*, 58 Ala. 489. Machinery used for making nails was held to be fixtures and included in a mortgage. *Delaware, &c. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452. It is held in Alabama that the franchise which a railroad company transfers by its mortgage is not its franchise to exist as a corporation, but only such of its franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of the property which the company itself had; especially when the charter merely authorizes the company to mortgage "its means, property, and effects," without express mention of franchises. *Meyer v. Johnston*, 53 Ala. 237. A mortgage made to

ground upon which this doctrine proceeds is that the grant was limited by the word "appertaining" to such property as belongs to and is an essential part of the franchise, so that it cannot be established or withdrawn at the pleasure of the company. And the same rule has been applied in the case of a mortgage of a railway "with its corporate privileges and appurtenances."¹ So it has been held that such a mortgage does not embrace woodland,² or land purchased

secure the payment of specific bonds is for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder. *Rice v. Southern Penn. R. Co.*, 9 Phila. (Penn.) 294. A railway company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works. *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. App. 201. Where a railway company, executing a mortgage upon its road as contemplated, has no legal title to any of the right of way, but only contracts for a small portion thereof, to be conveyed upon conditions which it never performs or has agreed to perform, and a new company is organized, which builds the road and acquires the legal title to most of the right of way, and is equitably entitled to the balance, no decree of foreclosure can be sustained under the mortgage, as against the new company, for the sale of its property. The mortgage creditors of such original company have no rights superior to the company itself. In such case the original company has no such interest or title in the road as can be subjected to sale under the mortgage. *Chicago, &c. R. Co. v. Loewenthal*, 93 Ill. 433. A railroad mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises, and to convey to the purchaser "all the estate, right, property, and interest, and to the same extent as the railroad company had therein at the date of the mortgage," etc., will be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution. *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105; *Randolph v. N. J. West Line R. Co.*, 28 N. J. Eq. 49.

¹ *Shamokin Valley R. Co. v. Livermore*, 47 Penn. St. 365. In the case of *Wabash, &c. R. Co. v. McKissock (sub nom. Humphreys v. McKissock)*, 140 U. S. 304, several railroad companies combined to construct an elevator, to be connected with their respective roads, each to contribute an equal sum towards its cost, and each to receive a corresponding amount of stock in a corporation organized to take title to the elevator and construct it. This arrangement having been carried out, one of the companies executed a mortgage of all its property as follows: "All and every part and parcel of the continuous line of road . . . as said road now is or may be hereafter constructed . . . together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars, and other appurtenances thereunto belonging." It was held that none of the companies had an interest in the elevator property which they could mortgage, and no interest in such property passed by the mortgage above described; nor could the elevator be considered in such a case as an appurtenance belonging to the mortgaged road. *Wabash, &c. R. Co. v. McKissock*, 140 U. S. 304. This case is distinguished in *Omaha, &c. R. Co. v. Wabash, &c. R. Co.*, 108 Mo. 298; 18 S. W. Rep. 1101, where a mortgage of the road in very similar terms was held to embrace lands subsequently purchased by the railroad company near a depot on the line of the mortgaged road, and a hotel erected thereon for the purpose of an eating-house, and to accommodate the employes of the company, passengers, and other persons. See *U. S. Trust Co. v. Wabash, &c. R. Co.*, 32 Fed. Rep. 480. See also *Thompson v. Kneeland*, 138 U. S. 414.

² *Dinsmore v. Racine, &c. R. Co.*, 12 Wis. 649.

for a certain specific use of the road, as for depots, shops, etc., but which has not actually been applied to that purpose.¹ Rights of action, legal or equitable, may be the subject of mortgage, but they must be specifically named in the mortgage, and do not pass under a general clause embracing "all personal property."² In a recent case before the United States Supreme Court, involving a mortgage by the company of its road, and all of its real estate then owned, or which might be thereafter acquired, appurtenant to the road or necessary to its operation, the court held that the mortgage did not embrace a grant of lands subsequently made to the company by Congress to aid in the construction of its road. The opinion goes on to say that "the word 'appurtenant,' as ordinarily defined, is that which belongs to or is connected with something else to which it is subordinate or less worthy, and with which it passes as an incident, — such as an easement or servitude to land; the tackle, apparel, rigging, and furniture to a ship; a right of common to a pasture, or a barn, garden, or orchard to a house or messuage. In a strict legal sense, it is said that land can never be appurtenant to land;³ but it was evidently contemplated by this mortgage that real as well as personal property subsequently acquired should pass under the lien of the mortgage. Property, however, not connected with what is ordinarily termed the plant, or not forming a part of the organic structure of the road, is never treated as appurtenant to it."⁴

¹ *Youngman v. Elmira, &c. R. Co.*, 65 Penn. St. 278. See *Boston, &c. R. Co. v. Coffin*, 50 Conn. 150. Compare *Omaha, &c. R. Co. v. Wabash, &c. R. Co.*, 108 Mo. 298; 18 S. W. Rep. 1101. In *Parish v. Wheeler*, 22 N. Y. 494, canal boats belonging to a railway company, but which were beyond its terminus, although accessory to its business, were held not to belong or appertain to the road in such a sense that they would pass under a clause in a mortgage conveying all property belonging or appertaining to the road, unless they were expressly specified. But it was held that they would pass under a general clause embracing "*all other personal property whatsoever, in any way*" belonging or appertaining to said railroad, as in the latter case the intention of the parties to convey the boats is clear. In the case of *Farmers' L. & T. Co. v. San Diego St. R. Co.*, 49 Fed. Rep. 188, the court held that rails, fish-plates, bolts, and similar

property bought by the street-railway company for the use of its road, but which had not been actually used, being stacked upon land not within the company's right of way, were within the terms of a mortgage executed by the company of all its real and personal property of every kind and description "used or intended to be used in connection with or for the purpose of said railroad."

² *Milwaukee, &c. R. Co. v. Milwaukee & Western R. Co.*, 20 Wis. 174.

³ *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 454; *Leonard v. White*, 7 Mass. 6; *Woodhull v. Rosenthal*, 61 N. Y. 382.

⁴ *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 55. Where a company, incorporated to construct a railroad between two cities named as its termini, executes a mortgage covering its entire line of road constructed or to be constructed between the named termini together with stations,

If the mortgage specifically enumerates certain personal property as embraced in the mortgage, all other kinds of personal property are excluded.¹ Therefore, in drawing up mortgages care should be exercised not to refer specifically to particular articles of personal property, unless other words are used which show that such specific description is not intended to exclude other kinds of personal property. There is now no question but that a railway company may include in a mortgage of its railway and appendages property to be thereafter acquired.² But the question as to whether after-acquired property is embraced in a mortgage of a railroad and its franchises, without express words to that effect, is of great importance. In some of the States it has been held that a railroad and its franchises are a unity, making an indivisible whole, and consequently that a mortgage covering these, without any express words to that effect, must necessarily embrace and attach to all property subsequently acquired for its use, upon the ground that it is an incident of the principal thing conveyed.³ But this doctrine, resting upon the doctrine of accession, can only apply to such accessions to the principal thing as were embraced within the franchises of the company, or its legislative authority, existing at the time when the mortgage was made, and cannot upon any line of reasoning or equitable ground be extended to property acquired under legislative authority subsequently obtained. Thus, if by its charter or other legislative act, at the time when the mortgage was executed, the company had authority to construct certain branch roads, the mortgage will cover such branch roads when constructed;⁴ but if

depots, etc., in the usual form, the lien of the mortgage extends to and covers the terminal facilities in the two cities, and is not limited to so much of the road as lies between the city limits of the two termini. *Central Trust Co. v. Kneeland*, 138 U. S. 414.

¹ *Brainerd v. Peck*, 34 Vt. 496. In *Smith v. McCullough*, 104 U. S. 25, a mortgage was executed upon its then and thereafter-to-be-acquired property, which was specifically named. It was held that certain municipal bonds issued to aid in the building of the road, which were not embraced in the description, were not covered by the mortgage. See also *Morgan v. Donovan*, 58 Ala. 241.

² *Coopers v. Wolf*, 15 Ohio St. 523;

Ludlow v. Hurd, 1 Dis. (Ohio) 552; *Dunham v. Cincinnati, &c. R. Co.*, 1 Wall. (U. S.) 254; *Coney v. Pittsburgh, &c. R. Co.*, 3 Phila. (Penn.) 173.

³ *Dinsmore v. Racine, &c. R. Co.*, 12 Wis. 649; *Ludlow v. Hurd*, 1 Dis. (Ohio) 552; *Pennock v. Coe*, 23 How. (U. S.) 117; *Shaw v. Bill*, 95 U. S. 10; *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207; *Pierce v. Emery*, 37 N. H. 410.

⁴ *Seymour v. Canandaigua, &c. R. Co.*, 25 Barb. (N. Y.) 284. In *Pittsburgh, &c. R. Co. v. Indianapolis, &c. R. Co.*, 8 Biss. (U. S.) 456, it was held that a mortgage upon a railway did not preclude the company from executing a lease of its road and property. In a well-considered

authority to build such branch roads was acquired by a grant obtained *subsequent* to the execution of the mortgage, they will not pass;¹ and this rule would apply to railroad companies organized under general statutes. The mortgage follows and attaches to any property which is an accession to the thing granted, which is embraced within the powers of the company as they existed when the mortgage was executed. Consequently, if the company under its charter has authority to change its location, it is held that the mortgage attaches to lands taken by it for such new location, and also to the new road built thereon, as well as all its appendages;² and this would undoubtedly be the rule where the location of the road is changed at certain points, even though the mortgage does not in terms apply to after-acquired property, as it would be unjust and inequitable to permit a railway, by changing the line of its road, to free that portion of it from the lien of the mortgage;³ and so long as the road is kept within the general plan the mortgage attaches to it;⁴ but according to the case last cited, and upon principle, the lien would be discharged upon that portion of the line which has been abandoned.

Where a mortgage embraces "after-acquired" property, it is held to include a lease of another road taken by the company,⁵ and in some instances has been held to apply to the net earnings of the road,⁶ while

case this question was passed upon, and the court held that a mortgage upon "all the property owned or which may hereafter be acquired" by a railway company was held not to apply to lands subsequently acquired under legislative authority, which the company had at that time no authority to acquire, as such lands cannot be said to come within the contemplation of the parties. *Meyer v. Johnston*, 53 Ala. 237. In a case before the United States Circuit Court—*Calhoun v. Memphis, &c. R. Co.*, 2 Flip. (U. S.) 442—it was held that under a general mortgage of a railway, after-acquired land does not pass unless it is used in connection with the actual operation of the road and as a part of it. And it was also held to be the rule even though the mortgage extended to "the railroad then constructed and to be constructed, and all other corporate property real and personal of said railroad company, belonging or appertaining to said railroad, whether then owned or thereafter to be acquired." But a contrary doctrine was held in *Hamlin v. European,*

&c. R. Co., 72 Me. 83. In that case it was held that such a mortgage operates upon the inchoate right of the company to a conveyance of lands under contracts subsequently made, as soon as the contracts are made and the company is in possession under them for the purposes of its charter, although the road is not built to such lands, and the right to use them in direct connection with the road without further legislative authority has expired.

¹ *Meyer v. Johnston*, 53 Ala. 237.

² *Seymour v. Canandaigua, &c. R. Co.*, 25 Barb. (N. Y.) 284. See also *Shaw v. Bill*, 94 U. S. 10.

³ *Elwell v. Grand St., &c. R. Co.*, 67 Barb. (N. Y.) 83.

⁴ *Meyer v. Johnston*, 53 Ala. 237.

⁵ *Buck v. Seymour*, 46 Conn. 156.

⁶ *Addison v. Lewis*, 75 Va. 701; *Tompkins v. Little Rock, &c. R. Co.*, 15 Fed. Rep. 6. There is now no question but that a railway company may pledge its net earnings, but so long as they remain in the hands of the mortgagor they are subject to trustee-process in favor of the gen-

in other cases it has been held — and, as we believe, correctly — that the mortgage does not apply to such net earnings unless so applied in express terms.¹ So such a mortgage is held to cover the capital stock of another railway company, purchased by the mortgagor subsequent to the execution of the mortgage;² but it does not include unpaid subscriptions to the capital stock of the company.³ Land grants to a railway company do not pass under a mortgage of its railway and after-acquired property, although expressly named, until the company has earned them, or, in other words, until it has performed the conditions which entitle it to receive them.⁴ Nor does the term embrace a grant of land which the company has no power to accept.⁵ Indeed, a mortgage of after-acquired property can only attach itself to property in the condition in which it comes to the mortgagor's hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires.⁶ When a railroad company has authority to purchase, and does purchase, a railroad lying within its chartered limits, the road so purchased becomes subject to a mortgage executed by the purchasing railroad company upon its line of road, completed and to be completed, but not to the prejudice of mortgages previously executed on the railroad so purchased.⁷ Where a railroad company mortgaged its main line of railroad from the eastern terminus thereof to its western terminus, and the lands for the main line, and

eral creditors of the road. *Gilman v. Illinois, &c. R. Co.*, 91 U. S. 603; *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Mississippi, &c. R. Co. v. U. S. Express Co.*, 81 Ill. 254; *Smith v. Eastern R. Co.*, 124 Mass. 154; *Bath v. Miller*, 51 Me. 341; *Noyes v. Rich*, 52 Me. 115; *Galena, &c. R. Co. v. Menzies*, 26 Ill. 121; *Ellis v. Boston, &c. R. Co.*, 107 Mass. 1; *Emerson v. European, &c. R. Co.*, 67 Me. 387; *Dunham v. Isett*, 15 Iowa, 284; *Clay v. East Tenn., &c. R. Co.*, 6 Heisk. (Tenn.) 421. Only the *net* earnings, after the payment of operating expenses, can be pledged. *Parkhurst v. Northern Central R. Co.*, 19 Md. 472.

¹ *Emerson v. European, &c. R. Co.*, 67 Me. 387; *De Graff v. Thompson*, 24 Minn. 452; *Pullan v. Cincinnati, &c. R. Co.*, 5 Biss. (U. S.) 237. Nor does a mortgage covering "all the income, rents,

issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived from its railroad or other property, or in any other way whatsoever" cover such moneys as were simply *past* income and earnings, but applies only to income subsequently accruing. *Dow v. Memphis, &c. R. Co.*, 20 Fed. Rep. 768.

² *Williamson v. N. J. Southern R. Co.*, 26 N. J. Eq. 398.

³ *Dean v. Biggs*, 25 Hun (N. Y.), 122.

⁴ *Campbell v. Texas, &c. R. Co.*, 2 Woods (U. S.), 263.

⁵ *Meyer v. Johnston*, 53 Ala. 227.

⁶ *Williamson v. N. J. Southern R. Co.*, 28 N. J. Eq. 277; 29 N. J. Eq. 311; *Haven v. Emery*, 33 N. H. 66.

⁷ *Branch v. Atlantic, &c. R. Co.*, 3 Woods (U. S.), 481.

the franchises acquired and to be acquired pertaining to the main line, it was held that it did not embrace lands and franchises acquired by and under a subsequent act of the Legislature authorizing an extension of the road.¹ The fact that a portion of the road, not built when the deed of trust was executed, was afterwards constructed, not on the route then surveyed and located, but on another route in the general direction authorized by the charter and amendments, does not deprive the holders of bonds, secured by the trust deeds on the road to be constructed, of the right to a first lien on it.² A mortgage of a railway and its after-acquired property only attaches to such property as is regularly acquired by it, and does not extend to property obtained by it by fraud, so that the title thereto does not vest in it,³ or to property acquired by it illegally and without authority.

SEC. 465. **Fixtures.** — The same rule as to fixtures applies in the case of a mortgage of a railway as applies in the case of a mortgage by an individual, and everything which properly comes under that head passes under the mortgage, although it is subsequently severed from the freehold. Thus, a mortgage of a railroad and all its property, real and personal, includes and covers old iron rails, etc., taken up from the road as useless and replaced by new ones,⁴ and also new rails purchased to be laid upon the road, but which have not been actually laid.⁵ But where a track is laid merely for temporary purposes, as to obtain gravel from a pit, or to take stones from a quarry, or to take freight to a certain point, it becomes no part of the railway, and does not pass under a general mortgage.

¹ *Randolph v. N. J. West Line R. Co.*, 28 N. J. Eq. 49. See *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105.

² *Meyer v. Johnston*, 53 Ala. 237.

³ *Williamson v. N. J. Southern R. Co.*, 28 N. J. Eq. 277; 29 id. 311; *Field v. Post*, 38 N. J. Eq. 346; *Frazier v. Frederick*, 23 N. J. Eq. 162.

⁴ *Salem Bank v. Anderson*, 75 Va. 250. Iron rails, spikes, ties, etc., are held to constitute a part of the realty, and to pass under a mortgage. Also cast-off articles, as broken rails, etc., are held to be included therein if a proper administration of the business would require that they should be recast. But tools, implements in workshops, and furniture in stations are held to be merely personalty and not subject to the lien of a mortgage. *Lehigh*,

&c. *Co. v. Central R. Co.*, 35 N. J. Eq. 379. But as to office furniture, etc., see *Ludlow v. Hurd*, 1 Dis. (Ohio) 552.

⁵ *Wutjen v. St. Paul, &c. R. Co.*, 4 Hun (N. Y.), 529. In this case the company was enjoined from selling or pledging such rails under a resolution of the board of directors. *Palmer v. Forbes*, 23 Ill. 301. But see *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207, where a contrary doctrine was held as to chairs intended for fastening down the rails, but which were never used for that purpose. See, also, affirming this doctrine, *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 524; *Farmers' Loan, &c. Co. v. Cary*, 13 Wis. 110; *Dinsmore v. Racine, &c. R. Co.*, 12 Wis. 649; also *Brainerd v. Peck*, 34 Vt. 496.

of the railroad.¹ Nor do tools and other implements used in repairing the railway or its appliances, but not attached to the realty, pass under such a mortgage,² nor coal, wood, or other materials used for fuel,³ nor an iron safe,⁴ nor office furniture.⁵

SEC. 466. **Rolling-stock.** — Whatever may be the rule as to engines, cars, and that species of property indispensable to the operation of the road, so far as third persons are concerned, there is no question but that, as between the parties thereto, a mortgage thereof is effectual to pass the title to the mortgagees. But the question as to whether or not the rolling-stock is to be regarded as a fixture, or as personal property, has been variously decided. In several States rolling-stock essential to the operation of the road, as cars, engines, etc., is held to be affixed thereto so as to pass under a mortgage of the railroad,⁶ and not to be subject to levy or sale upon execu-

¹ Van Keuren v. Central R. Co., 38 N. J. L. 165.

² Williamson v. N. J. Southern R. Co., 29 N. J. Eq. 311.

³ Hunt v. Bullock, 23 Ill. 320. But see Coe v. McBrown, 22 Ind. 252, *contra*.

⁴ Titus v. Mabree, 25 Ill. 257.

⁵ Hunt v. Bullock, 23 Ill. 320. While the better view is as stated in the text, there are cases holding the other way. See Raymond v. Clark, 46 Conn. 129; Ludlow v. Hurd, 1 Dis. (Ohio) 552.

⁶ Buck v. Memphis, &c. R. Co. (Tenn.), 4 Cent. L. J. 430; Williamson v. N. J. Southern R. Co., 28 N. J. Eq. 277; *reversed*, 29 id. 311; Palmer v. Forbes, 23 Ill. 301; Minnesota Co. v. St. Paul Co., 6 Wall. (U. S.) 142. But the mortgagee takes the property subject to all valid liens, as, for example, the lien of a vendor who retains title until the purchase price is paid. Huidekoper v. Locomotive Works, 99 U. S. 258.

A chattel mortgage on the equipment of a railroad was made by authority of the board of directors of an insolvent corporation for securing the claims of directors against the corporation, and it was held that it was invalid as against prior mortgagees of the franchise and equipment, whose mortgages were not filed, because the directors, who were also stockholders, had notice of the prior mortgages. Such prior mortgages, however, were held not to be valid against judgment creditors, who,

but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a valid levy on the equipment. Coe v. N. J. Midland R. Co., 31 N. J. Eq. 105. In New Jersey, it is held that a mortgage executed by a railroad corporation on its road-bed and franchises, together with its engines, cars, and rolling-stock, so far as regards the latter class of property, is a chattel mortgage within the provisions of the act concerning chattel mortgages. Williamson v. N. J. Southern R. Co., 29 N. J. Eq. 311. Rolling-stock does not necessarily become fixed to the railroad upon which it is placed. Therefore a mortgage, although in terms covering future acquisitions of rolling-stock, does not attach to the rolling-stock of a third person subsequently placed on the road under a contract with a company then operating it. Hardesty v. Pyle, 15 Fed. Rep. 778. See, also, Meyer v. Johnston, 53 Ala. 237. Rolling-stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly recorded as a mortgage of realty, need not be recorded also as a chattel mortgage. Farmers' L. & T. Co. v. St. Joseph, &c. R. Co., 3 Dill. (U. S.) 412. A mortgage of "all the present and future-to-be-acquired property of the company, including the right of way and land occupied, and all rails and other materials used therein or procured therefor," includes the

tion.¹ In some of the States the constitution expressly provides that it shall be regarded as personal property, — as in Arkansas, Illinois, Mississippi, Missouri, Nebraska, Texas, and West Virginia, — while in others it is expressly provided by statute that a mortgage of the property of a railroad company, embracing personal property, shall be recorded in certain offices, and when so recorded shall be effectual to pass the title to the mortgagee as against the creditors of the company. Consequently, in determining the force which the decisions of one State upon this question should have in another, the statutory and constitutional provisions (if any) relative thereto should be looked to.² But the better view unquestionably is that where the statute does not provide otherwise, the rolling-stock is to be regarded as personalty; it is scarcely reasonable to regard as realty, property which is one week in New York and the next week in California, which changes its locality by many miles every hour.³

rolling-stock of the road. *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35. Parties claiming an equitable lien upon rolling-stock furnished to an insolvent corporation, by virtue and to the extent of advancements made on account of the same, will not be entitled to be heard on petition, pending foreclosure proceedings upon a mortgage covering the rolling-stock and all other property of the corporation, upon which rolling-stock other liens are set up by answer, claimed to be paramount to the mortgage of the complainants. *N. J. Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658. In Maine, a mortgage lien was held valid upon rolling-stock removed to be changed to a narrower gauge, and such lien was held not to be lost by a consolidation of the mortgagor with another company. *Hamlin v. Jerrard*, 72 Me. 62. The provision in the Illinois constitution of 1870, that the rolling-stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling-stock, if obtained before the rights of execution creditors attach. *Scott v. Clinton, &c. R. Co.*, 6 Biss. (U. S.) 529. In the United States Supreme Court it is held that the chattel-mortgage statute is inapplicable to an ordinary railway mortgage. *Hammock v. Loan & Trust*

Co., 105 U. S. 77. Iron rails, spikes, ties, etc., constitute part of the realty and pass by the mortgage of the road. So cast-off articles, such as broken rails or ties, remain subject to lien of the mortgage if proper administration would require their being recast or repaired. Tools and implements in workshops, and furniture in station-houses, etc., are mere personalty and not subject to the lien of a railway mortgage. *Lehigh Coal & Nav. Co. v. Central R. Co.*, 35 N. J. Eq. 379.

¹ *Gue v. Tide Water Co.*, 24 How. (U. S.) 257; *Youngman v. Elmira, &c. R. Co.* 65 Penn. St. 278; *Shamokin Valley R. Co. v. Livermore*, 47 Penn. St. 465; *Coney v. Pittsburgh, &c. R. Co.*, 8 Phila. (Penn.) 173; *Macon, &c. R. Co. v. Parker*, 9 Ga. 377; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Grand Trunk R. Co. v. Eastern Counties Bank*, 11 L. C. J. 11.

² In *Milwaukee, &c. R. Co. v. James*, 6 Wall. (U. S.) 750, the rolling-stock was considered as being realty; but this holding was in pursuance of a statute providing specifically that it should be so considered. *Chicago, &c. R. Co. v. Fort Howard*, 24 Wis. 41; 91 Am. Dec. 458.

³ *Michigan Cent. R. Co. v. Chicago, &c. R. Co.*, 1 Ill. App. 399; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa, 56; *Pacific R. Co. v. Cass Co.*, 53 Mo. 17; *Boston, &c. R. Co. v. Gilmore*, 37 N. H. 410;

It is the usage in this country for all railroad companies receiving cars from other roads to make necessary repairs at their own expense, unless the car is inspected and branded as defective when first received. Therefore a company which claims cars belonging to another road, and, pending a judicial determination of the title thereto, is, by agreement, permitted to retain and use them subject to a rental in case the decision is against its claim, cannot, after the decision against it, set off against the rental any claim for repairs made on the cars.¹

SEC. 467. Bonds of Railway Companies. — Mortgages of railways are usually given to secure the payment of certain bonds issued by the company, and when made payable to order or bearer they are treated as negotiable, although under seal,² and the mortgage enures to the benefit of any *bona fide* holder thereof. This is the rule even as to coupon bonds, and a *bona fide* purchaser of a bond not due is not affected by any equities which might attach against the original holder, although some of the matured interest coupons are attached thereto.³

State Treasurer v. Somerville, &c. R. Co., 28 N. J. L. 21; Williamson v. N. J. Southern R. Co., 29 N. J. Eq. 311; Randall v. Elwell, 52 N. Y. 521; 11 Am. Rep. 747; Hoyle v. Plattsburg, &c. R. Co., 54 N. Y. 315; 13 Am. Rep. 594; Stevens v. Buffalo, &c. R. Co., 31 Barb. (N. Y.) 602, *overruling* Farmers' L. & T. Co. v. Hendrickson, 25 Barb. (N. Y.) 484; Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619; Coe v. Columbus, &c. R. Co., 10 Ohio St. 372; Hill v. La Cross, &c. R. Co., 11 Wis. 214; Green's Brice's Ultra Vires, p. 238, n.; 1 Minor's Insts. (3d ed.) p. [541] 609; Pingrey on Chattel Mortgages, §§ 428 *et seq.*; *ante*, § 290. There are a number of cases, however, upholding a different view on the ground that the rolling-stock is to be regarded as fixtures and essential to the enjoyment of the freehold, and is therefore embraced in a mortgage of the realty belonging to the road. Tiedeman on Real Property, § 2; Palmer v. Forbes, 23 Ill. 301; Hunt v. Bullock, 23 Ill. 320; Titus v. Mabee, 25 Ill. 257; Louisville, &c. R. Co. v. State, 25 Ind. 177; Phillips v. Winslow, 18 B. Mon. (Ky.) 431; Morrill v. Noyes, 56 Me. 458; Strickland v. Parker, 54 Me. 263; State v. Northern Cent. R. Co., 18 Md. 193; Farmers' L. &

T. Co. v. St. Joseph, &c. R. Co., 3 Dill. (U. S.) 412; Pennock v. Coe, 23 How. (U. S.) 117. See also Farmers' L. & T. Co. v. Commercial Bank, 11 Wis. 207.

¹ Central Trust Co. v. Wabash, &c. R. Co., 50 Fed. Rep. 857.

² Virginia v. Chesapeake, &c. Canal Co., 32 Md. 501; Chapin v. Vermont, &c. R. Co., 8 Gray (Mass.), 575; Morris Canal Co. v. Fisher, 9 N. J. Eq. 667; Dinsmore v. Duncan, 57 N. Y. 573; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175; Clark v. Iowa City, 20 Wall. (U. S.) 583; Carr v. Le Fevre, 27 Penn. St. 413; Langston v. South Carolina R. Co., 2 S. C. 248; Craig v. Vicksburgh, 31 Miss. 216; Jackson v. York, &c. R. Co., 48 Me. 147.

³ National Bank v. Kirby, 108 Mass. 497; Cromwell v. County of Sac, 96 U. S. 51. But see First National Bank v. County Com'rs, 14 Minn. 77, *contra*. *Prima facie* the transferee of coupon bonds is presumed to be a *bona fide* holder, and if it is claimed that he is not, the party making such claim has the burden of proving that he is not so. Pennsylvania Transp. Co.'s App. 101 Penn. St. 576. The holder of a bond negotiable in form, with the

Although, as a general rule, bonds issued by a corporation for the purpose of procuring loans, and made payable to bearer, are negotiable, yet when such instruments contain special stipulations, and their payment is subject to contingencies not within the control of the holders, they are deprived thereby of the character of negotiable instruments, and are subject, in the hands of a transferee, to any defence existing thereto that would be available if they were still held by the original payer.¹ To be negotiable such an instrument must provide for the unconditional payment to a person or order, or bearer, of a certain sum of money, at a time capable of exact ascertainment.² The interest coupons attached to such a bond, where they refer to the bond, partake of the same character as the bond itself is; this character is not changed by cutting them off from the bond, and, although an action may be maintainable upon the coupons without the production of the bond, a recovery must be based upon the obligation contained in the bond, and cannot be had contrary thereto. Therefore, in an action to recover the amount of certain interest coupons cut from, and on their face referring to, bonds issued by a railroad company, which bonds and the mortgage given to secure them contained conditions that the time of payment of principal and interest might be changed and postponed, from time to time, at the option of a majority of the holders of the series of bonds issued simultaneously with those from which the coupons were taken, the court held that they were not negotiable instruments; that the holder was chargeable with notice of the terms of the bonds, and that if the payment

name of the payee left blank, may fill the blank with his own name, and sue upon it. *White v. Vermont, &c. R. Co.*, 21 How. (U. S.) 575. The C. W. R. Co., a Connecticut corporation, in pursuance of the laws of that State, to secure certain bonds issued by it, executed to the State treasurer a mortgage which by its terms carried all the railway lands and personal property then or thereafter belonging to said corporation, and all its rights and franchises under its charter. Default having occurred in payment of interest, the corporation, as provided for by the bonds, formally surrendered its property to plaintiff as such trustee. Defendant, as sheriff by virtue of an attachment issued in an action brought in this State against said corporation, levied upon certain of its personal property found here. In an action to recover pos-

session thereof, it was held that the bonds, having been issued by the State comptroller as required by the law of Connecticut, and being valid upon their face, plaintiff was not bound to show that the provisions of law authorizing their issue had been complied with, but the burden was upon defendant to show their invalidity; also that if any of the conditions precedent to taking of possession had not been complied with, these had been waived by the corporation by voluntarily surrendering possession; and that defendant could not insist upon them. *Nichols v. Mase*, 94 N. Y. 160.

¹ *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469.

² See Tiedeman on Com. Paper, § 25; *Palmer v. Gray*, 6 Gray (Mass.), 340.

of interest had been postponed in accordance with the condition of the bonds, until the period of extension had expired, an action at law could not be maintained upon the coupons, although plaintiff had not assented to the postponement.¹

If a bond is overdue, the purchaser takes it subject to the rights of previous holders.² If such bonds are not negotiable, they are mere choses in action, and every holder takes them subject to all equities.³ Of course where a bond refers to the mortgage given to secure it, it becomes subject to all the recitals and statements therein affecting it.⁴ If a bond is incomplete when issued, it does not become entitled to the privileges of negotiable paper. The uncertainty arising from their incompleteness defeats their negotiability,—as, if the amount of principal or interest is left blank, or any other essential omission exists upon the face of the bond.⁵

In seeking a remedy upon these bonds, if they were issued under a statute authorizing their issue for a particular purpose, it has been held that the plaintiff should allege that the bond was issued for money borrowed for such purpose, and that it was necessary for that purpose;⁶ it is hardly probable that the latter allegation is necessary, but the former must be made and proved, for if the bonds have been used for a purpose other than that for which they were authorized, they are void except in the hands of innocent holders.⁷ It need not

¹ *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469. Where, however, by the terms of the bonds and mortgage, "in case of default" in payment of interest, a majority of bondholders were authorized to waive the default and instruct the mortgage trustees to waive it, and it was expressly provided that no action on the part of the bondholders or trustees "in case of any default shall affect any subsequent default, or any right arising therefrom;" it was held, that the bondholders had no authority to anticipate and provide for any default in the payment of interest before it occurred; that every bond and coupon holder had the right to insist that the conditions of the exercise of the power should be exactly complied with; and that a written instruction by a majority of the bondholders to the trustees to postpone the payment of interest for five years was inoperative and no defence to an action. *McClelland v. Railroad Co.*, 110 N. Y. 469.

² *Vermilye v. Adams Exp. Co.*, 21 Wall. (U. S.) 138. Where overdue mortgage bonds belonging to the company are bought at forty cents on the dollar from the vice-president of the company, after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property, such a purchaser cannot claim to be a *bona fide* holder, when inquiry on his part would have shown that the vice-president had no authority to sell the bonds. *American, &c. R. Co. v. St. Louis, &c. R. Co.*, 42 Fed. Rep. 819.

³ *Athenæum Life Ass. Soc. v. Pooley*, 3 DeG. & J. 294.

⁴ *Caylus v. New York, &c. R. Co.*, 10 Hun (N. Y.), 295.

⁵ *Jackson v. Vicksburgh, &c. R. Co.*, 2 Woods (U. S.), 141; *Ledwick v. McKim*, 53 N. Y. 307.

⁶ *Miller v. N. Y. & Erie R. Co.*, 18 How. Pr. (N. Y.) 374.

⁷ In a Pennsylvania case, the bonds

be alleged that the bond was presented at the time and place named therein for payment, but if the payor was at the place named at the time, ready to pay the same, such circumstance would be a defence to an action upon the bond.¹ If a bond contains a provision making it convertible into the stock of the company, such right grows out of the ownership of the bond and can only be exercised by the holder thereof,² and that too within the time specified in the bond, unless the time has been regularly extended.³

The numbers upon bonds do not create any priority of lien, but the bond last issued stands upon the same footing as the first; and if there has been an over-issue of bonds, all bearing the same date, they all stand upon the same footing, and, if the mortgaged property is inadequate to pay, all are entitled to share in the proceeds *pro rata*.⁴ But if the number of bonds to be secured is limited by the statute, or the mortgage itself, this rule could not prevail.⁵ The law presumes that all the bonds secured by the mortgage were issued at the same time, and the fact that the bonds are numbered consecutively does not defeat this presumption.⁶ Indeed, unless the law requires that the bonds shall be numbered, it is not material that they should be numbered, and an alteration of the number does not vitiate the bond.⁷ Where bonds are issued and secured by the same mortgage, and maturing at different dates, they are entitled to be paid in the order of their maturity; though when they all mature at the same time, they all stand upon the same footing.⁸

were issued pursuant to a vote of the stockholders "for the purpose of extending and constructing" the road, for the purchase of rolling-stock and similar equipments therefor, etc., but it appeared that they were never sold to obtain funds for such purposes, but were pledged by the president and vice-president to secure antecedent indebtedness of the company, largely due to other companies of which the president and vice-president were officers or directors. It was held that the pledge was without authority, and in fraud of the rights of stockholders, and conveyed no rights whatever. *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 45 Fed. Rep. 518. See same principle in *Chicago v. Cameron*, 22 Ill. App. 91, *affirmed* in 11 N. E. Rep. 899; *Frazier v. East Tenn., &c. R. Co.*, 88 Tenn. 138.

¹ *Wallace v. M'Connell*, 13 Pet. 136.

² *Denny v. Cleveland, &c. R. Co.*, 28 Ohio St. 108.

³ *Muhlenburg v. Philadelphia, &c. R. Co.*, 47 Penn. St. 16.

⁴ *Stanton v. Alabama, &c. R. Co.*, 2 Woods (U. S.), 523; *Claplin v. So. Carolina R. Co.*, 8 Fed. Rep. 118.

⁵ *Ames v. New Orleans, &c. R. Co.*, 2 Woods (U. S.), 207.

⁶ *Stanton v. Alabama, &c. R. Co.*, 2 Woods (U. S.), 523.

⁷ *Com. v. Emigrants' Sav. Bank*, 98 Mass. 12; *Birdsall v. Russell*, 29 N. Y. 220; *Spooner v. Holmes*, 102 Mass. 503.

⁸ *Humphrey v. Morton*, 100 Ill. 592. Holders of bonds secured by deed of trust upon property, which together with other property, not included in the deed of trust, was afterwards mortgaged to secure a subsequent series of bonds, some of which were placed in the hands of a special

The fact that some coupons of first lien bonds were paid in State guaranteed bonds under the provisions of a statute raises no equity for the payment of the unfunded coupons of the same class and dates, in preference to the bonds and later coupons. Such unfunded coupons are entitled to take only their *pro rata* with other bonds and coupons of the first lien not postponed by settlement or the estoppel of their owners.¹

In a case before the United States Circuit Court, there was upon the property of a railway corporation a lien for an early debt established by the charter of the company. A mortgage was made, and bonds executed which were chiefly to be issued in taking up the early debt, but the amount exceeded the debt. Afterwards a subsequent mortgage was executed to secure later obligations. It was held that as against the second mortgage the first mortgage secured both the early debt and the bonds issued in excess of that amount, whether in the hands of *bona fide* holders at the time of the execution of the second mortgage, or issued by the company after that time, as collateral security for a debt then contracted.²

SEC. 467 *a*. **Coupons.** — Coupons for the interest accruing upon the bonds become due at the time stated therein, or in the bond, as the date of their maturity, and if the mortgage so provides the trustees may proceed to foreclose if they are not paid at maturity, or the holder thereof may bring an action at law to enforce their collection.³ They are, when detached, negotiable securities, and pass

trustee, "to be applied exclusively for the purpose of discharging the property conveyed from prior liens," are not entitled to have the fund for the payment of their liens increased by means of the bonds in the hands of such trustee, it being the evident purpose of the deposit of the bonds to put all the debts of the company upon an equal footing, and not to increase the security already existing for the payment of the first bonds. *Meyer v. Johnston*, 53 Ala. 237.

¹ *Hand v. Savannah, &c. R. Co.*, 17 S. C. 219. In the case of *Fidelity Ins. Co. v. Shenandoah Valley R. Co.*, 33 W. Va. 761, certain first-mortgage bonds of a railroad company were surrendered to it by a construction company, were cancelled, and the mortgage securing them was released, pursuant to an agreement by which the construction company was to receive certain second-mortgage bonds and certain

income bonds in lieu of those surrendered. The railroad company failed to deliver these bonds, and executed three mortgages to a mortgagee who had notice of the agreement. The construction company then claimed the bonds cancelled, attempting to repudiate the agreement. The court held that the agreement would be sustained, that the construction company was therefore entitled to a lien, the priority of which was fixed by the terms of the agreement and not by the date of the mortgage securing the bonds surrendered by it; that the agreement gave the construction company an equitable lien on the property of the road for an amount equal to the face value of the bonds agreed to be delivered to it, together with interest.

² *Clafin v. So. Carolina R. Co.*, 4 Hughes (U. S.), 12.

³ *Welsh v. St. Paul, &c. R. Co.*, 25 Minn. 314.

from hand to hand by delivery, and *assumpsit* lies thereon.¹ But unless the mortgage contains some provision to that effect, they are not entitled to priority in payment over the principal of the bonds or the coupons subsequently maturing.² Interest is allowed upon coupons from their maturity, whether the bond or coupon so provides or not.³

A detached coupon payable to bearer and held by one party, while the bond is held by another, is nevertheless a lien under the mortgage given to secure the bond, and the holder is entitled to a *pro rata* distribution.⁴ Indeed it has been held that the statute of limitations does not run upon a coupon until it has run upon the bond itself.⁵ But the accuracy of this doctrine is open to a serious question, and probably would not be generally accepted.⁶ If a coupon contains no negotiable words, an action cannot be maintained thereon in the name of an assignee,⁷ unless the statute makes some provision therefor.

The bond is the principal debt, and the mortgage an incidental security, therefore, a provision in the mortgage that upon certain defaults the principal shall become due, and upon request of the holders of a certain amount of the bonds, the trustees should sell the property, does not defeat an action at law to recover the amount of overdue coupons.⁸ Where there is a discrepancy between the bonds and the mortgage as to the time when it matures, the bond will control,⁹ but where the mortgage contains a condition to which the bond makes no reference, the condition may be enforced by the trustees, though not by the bondholders, even though the trustees refuse to enforce the condition, and though the condition is indorsed upon the bonds by the trustees and signed by them.¹⁰

If bonds are authorized to be issued and the property to be mortgaged without any special restrictions, it is treated as authorizing the issue of bonds and a mortgage with usual conditions, and if unusual conditions are inserted, they will be void, but the mortgage and

¹ First Nat. Bank v. Mt. Tabor, 52 Vt. 87.

² Duncan v. Mobile, &c. R. Co., 3 Woods (U. S.), 567.

³ Welsh v. St. Paul, &c. R. Co., 25 Minn. 314.

⁴ Miller v. Rutland, &c. R. Co., 40 Vt. 399.

⁵ Kenosha v. Lamson, 9 Wall. (U. S.) 477.

⁶ See 1 Wood on Limitations (2d ed.) p. 362, § 127.

⁷ Jackson v. York, &c. R. Co., 48 Me. 147.

⁸ Philadelphia, &c. R. Co. v. Johnson, 54 Penn. St. 127.

⁹ Railroad Co. v. Sprague, 103 U. S. 756.

¹⁰ Mallory v. West Shore, &c. R. Co., 3 J. & S. (N. Y. Super. Ct.) 174.

the bonds may be enforced in all other respects;¹ according to the case last cited, the bonds would have been good as to all the conditions if they had been subsequently ratified by the board.

If a place of payment is named in the coupons, they should be presented there for payment; but if, in fact, the company had no money there to pay them, presentation is dispensed with.² A coupon made payable to bearer, or to a certain person or order, is negotiable; but if the name of the payee is blank, it is not strictly negotiable in law.³ Interest upon coupons at the contract rate is recoverable from the date of presentation,⁴ and the coupons may be sued upon by the holder, although he does not own the bond.⁵ Except where the statute otherwise provides, a bond made payable with an illegal rate of interest bears interest at the legal rate.⁶

The holders of detached coupons are entitled to their *pro rata* share in the distribution of money received upon foreclosure sale, and if the decree is deficient in that respect the court has the power to and will modify it so as to secure such a result.⁷

¹ Jessup v. City Bank, 14 Wis. 331.

² North Penn. R. Co. v. Adams, 54 Penn. St. 94; Phila., &c. R. Co. v. Johnson, 54 Penn. St. 127.

³ Wright v. Ohio, &c. R. Co., 1 Dis. (Ohio) 465.

⁴ Beckwith v. Hartford, &c. R. Co., 29 Conn. 265.

⁵ Kenosha v. Lamson, 9 Wall. (U. S.) 477; Haven v. Grand Junction R. Co., 109 Mass. 88.

⁶ Philadelphia, &c. R. Co. v. Lewis, 33 Penn. St. 33.

⁷ Sewall v. Brainerd, 38 Vt. 64. Thus the Vermont & Canada R. Co. leased its road to the Vermont Cent. R. Co. for a certain rent upon certain conditions, securing the payment thereof. The latter company then issued bonds to a large amount, with interest payable semi-annually, upon presentation of the coupons attached to the bonds, and secured the bonds by a mortgage to the trustees of its franchises and property. Subsequently the former company brought a bill in chancery against the latter company, the trustees, and some of the bondholders, to secure its lien, claiming possession of both roads for the non-payment of rent. The trustees were appointed receivers under direction to hold possession and

operate both roads, and before final decree of the court, the former company and the great body of the first-mortgage bondholders entered into an agreement compromising all matters of controversy. The arrangement was made binding by an act of the legislature, and a petition brought to the court of chancery, and a decree obtained in pursuance of the agreement, by consent of both railroad companies and the bondholders. Among other things, the decree provided that the trustees and receivers should pay for a certain extension of the Vt. & Can. road to an amount not exceeding \$250,000, and as often as \$70,000 should be so expended, said company should issue shares of its stock to said trustees and receivers at par, to be ratably distributed by them among said bondholders, in liquidation of their respective claims as such. After providing for other payments, including said rents, the decree provided for the application of the payment of the net income on the first-mortgage bonds. The receivers having given notice that they were ready to pay 3½ per cent of the first-mortgage bonds, which was the first \$70,000, in Vt. & Can. Co. stock mentioned in the decree, and having refused to pay the same to the holders of the coupons which

A guaranty by the lessee of a railroad to "pay the interest upon the within bond as specified in the coupons thereto attached" is not a separate promise to pay each coupon, but is a guaranty of the whole interest to become due on the bonds, and though each coupon is for less than \$100, the guaranty is not within the prohibition of a statute requiring obligations of railway companies to be for a sum not less than \$100.¹ A bill brought by the trustees of a mortgage, to foreclose it, is not demurrable because it does not contain an allegation that the interest coupons were presented for payment at the place where they were made payable.² But where the mortgage provides that it may be foreclosed upon request of a certain number of bondholders, the bill should allege such request.³ The remedy by foreclosure for non-payment of interest coupons as they mature, is merely cumulative, and does not exclude the remedy at law,⁴ and, even though the trustees foreclose, the holders of detached coupons are not thereby precluded from bringing assumpsit to recover the amount due thereon.⁵

SEC. 468. Trustees, Relation of, to Bondholders and Company: Powers and Duties of. — Where a mortgage of a railway is made to certain persons in trust, to secure the payment of a certain class of indebtedness, such persons occupy a merely nominal position until some of the conditions of the mortgage have been broken. When, however, the conditions of the mortgage have been broken, their duties become active, and generally, by the terms of the mortgage, they are authorized, if not required, to take possession of the property and dispose of it for the benefit of the bondholders. Limitations in the mortgage deed upon the power of the trustee to take proceedings to enforce the payment of the amount secured are to be strictly

had been severed from the bonds by the bondholders and sold, said coupon-holders petitioned the chancellor who made the decree to direct the receivers to make the payment to them under the decree, or if necessary to so modify the decree as to give them the dividend. It was held that the decree does not decide to which class this payment shall be made; but if it did, since no such question was presented to the chancellor, he may modify his decree on this petition. Also that the coupon-holders have the right in equity to have payment made to them in the order in which the coupons fall due, whether negotiable or not separate from the bonds, and

that on a final distribution of the proceeds of the whole of mortgaged property, a *pro rata* distribution would probably be the rule. *Sewall v. Brainerd*, 38 Vt. 364.

Eastern Bank v. St. Johnsbury R. Co., 40 Fed. Rep. 423.

² *Savannah, &c. R. Co. v. Lancaster*, 62 Ala. 555.

³ *Chicago, &c. R. Co. v. Fosdick*, 106 U. S. 47.

⁴ *Dow v. Memphis, &c. R. Co.*, 20 Fed. Rep. 768; *Manning v. Norfolk Southern R. Co.*, 29 Fed. Rep. 838.

⁵ *Welsh v. St. Paul, &c. R. Co.*, 25 Minn. 314.

construed. Thus, where a trust deed provides that the trustee should, upon the written request of two-thirds of the bondholders, "enter upon and take possession of the property and operate it, or, upon the request of a similar majority, should sell the property at public sale, the request of two-thirds of the bondholders is not necessary in order to enable the trustee to institute proceedings to foreclose, and the petition for foreclosure need not allege such a request.¹ And a further provision in the trust deed, prescribing a particular mode of sale, and declaring that it shall be exclusive of all others, is absolutely void, in that it attempts to provide a remedy in the ordinary course of judicial proceedings and to oust the jurisdiction of the court.²

From the time they enter into the possession of the property, they become trustees not only for the bondholders, but also for the corporation and all subsequent mortgagees.³ Their primary duty, however, is to protect the interests of the bondholders to the full extent of their power and ability, and for this reason they have no authority to consent to the payment of an unsecured debt out of the property, until the bondholders have first been paid, or an ample fund for their payment has been provided.⁴ It is the duty of the trustees, upon the breach of the conditions of the mortgage, either to take possession of the property under the power in the mortgage, or to commence proceedings to foreclose it;⁵ and if they unreasonably neglect or refuse to act, any of the bondholders may commence proceedings to that end for themselves and all other bondholders, making the trustees defendants; and especially may this be done if the trustees have practised or connived at any fraud, or attempted to enter into any arrangement with the corporation, or third parties, which is calculated to defeat or prejudice the rights of the bondholders.⁶ If the trustees enter into possession of the road and

¹ Guaranty Trust, &c. Co. v. Green Cove R. Co., 139 U. S. 137; *distinguishing* Chicago, &c. R. Co. v. Shall, 106 U. S. 47, 77. See also same principle in Alexander v. Central R. Co., 3 Dill. (U. S.) 487; Credit Co. v. Arkansas, &c. R. Co., 15 Fed. Rep. 46; Morgan's La., &c. R. Co. v. Tex. Central R. Co., 137 U. S. 171.

² Guaranty Trust, &c. Co. v. Green Cove R. Co., 139 U. S. 137; Hope v. International Society, 4 Ch. Div. 327; Edwards v. Aberayron Ins. Soc. 1 Q. B. D. 563; Noyes v. Marsh, 123 Mass. 286.

³ Sturgis v. Knapp, 31 Vt. 1; Ashuelot R. Co. v. Elliott, 57 N. H. 397.

⁴ Duncan v. Mobile, &c. R. Co., 2 Woods (U. S.), 542.

⁵ Sturgis v. Knapp, 31 Vt. 1.

⁶ Wutjen v. St. Paul, &c. R. Co., 4 Hun, 529; Van Benthussen v. Central, &c. R. Co., 17 N. Y. Supp. 709; McFadden v. May's Landing, &c. R. Co., 49 N. J. Eq. 176. In this last case the court also holds that an averment to the effect that the bondholder who sues, does so in behalf of himself and all other bondholders, is unnecessary when default has been made only on bonds payable to the suitor.

property, they are entitled to exercise the franchises of the company so far as is necessary to effectuate the interest of the bondholders, and until the debt is paid.¹ If they resort to foreclosure proceedings, and under the statute the absolute title to the road is vested in them, they hold the title in trust for the bondholders, and have no power to divest themselves of the title in violation of their trust.² They retain their trust until it has been fulfilled, unless they have been discharged by consent of the parties or by order of a court having competent authority, or have become incapacitated to

¹ Wood v. Goodwin, 49 Me. 250.

² Haven v. Grand Junction R. Co., 12 Allen (Mass.), 337. The fact that subsequent to the execution of the mortgage the company is consolidated with another does not affect the security, as there can be no loss of identity of the original companies by the consolidation, to defeat the rights of prior creditors, or to defeat prior liens. Hamlin v. Jerrard, 72 Me. 62. The holder of the bonds of a railway and telegraph company payable to bearer, with interest semi-annually, secured on the income from the sale of its land and the operation of its road and line, which have passed by consolidation to another company, is a creditor having a specific lien upon the income of the property which has gone from his debtor into the hands of the other company, and he may file a bill in equity to enforce such lien after the default in payment of the principal of such bonds and interest according to the terms thereof. Rutten v. Union Pacific R. Co., 17 Fed. Rep. 480. One of these consolidated railroad companies, not having been able to pay the interest on its bonds, gave to the holders of the interest coupons the coupon bonds of the company for the amount of said interest. It was held that this was not a novation of the debt for the interest, and these bonds are secured by the mortgage. Gibert v. Washington, &c. R. Co., 33 Gratt. (Va.) 586. In Hazard v. Vt. & Canada R. Co., 17 Fed. Rep. 753; 12 Am. & Eng. R. Cas. 383, the Vt. Central R. Co., of which the Vt. and Canada R. Co. was an extension, leased the whole line of road, and subsequently a contract was made that, upon default in payment of rent for four months, the Canada Company might enter upon both roads, and

take the whole income of them until the rent should be paid up, when the Central Company might resume control. The State court, in construing this lease and agreement, held that the Vermont Central Company became the owner of the whole line, including the two roads, subject to certain rights and interests in the property of its mortgage bondholders, and the rent claims of the Vermont and Canada Company, and that the Vermont and Canada Company held and owned the right to a fixed annual rent, as a first charge on the income arising from the use of said lines of road, and a right to compel the application of such income to the extinguishment of such rents, if in arrear. Subsequently the roads consolidated as the Consolidated R. Co. of Vermont, which issued \$7,000,000 of bonds, secured by mortgage of its roads and property to the American Loan and Trust Company, as trustee for the bondholders, to further secure which a mortgage was executed by the Canada Company, and the bonds delivered to the same trustee; \$1,000,000 of which, as a compromise, it was agreed should be accepted by the security holders of the Canada Company in place of all claim for rent, past and future. It was held that the mortgage executed by the Canada Company was a mortgage of the rent charge only, and that, as it had the right to deal with the rent, it had the right to change the security by the issue of the bonds as proposed; and as it appeared to be for the benefit of the stockholders that such compromise should be carried out, the delivery of the bonds of the Consolidated Company to the stockholders of the Vermont and Canada Company would not be restrained.

act.¹ While operating the road as trustees they are liable as common carriers, and indeed may sue or be sued, for any injury or default committed by them, precisely the same as the original company might be, and the property in their hands is liable to respond to the judgment.² But they are not liable on contracts entered into by the company for the purchases of materials before they took possession.³

SEC. 469. Removal of Trustees, Appointment of, etc. — Where a trustee named in a mortgage becomes incapacitated to act from any cause, or where he removes from the country,⁴ or dies,⁵ the trust does not descend to his heirs; but generally the statute makes provision for the filling of such vacancy, and in that case the statutory mode should be pursued;⁶ but in the absence of any statutory provision a court of equity in proper proceedings can appoint a person to fill the vacancy when necessary to preserve the trust. It is not uncommon for the mortgage or trust-deed to provide the manner in which vacancies shall be filled, and where this is true, such provisions must prevail in all cases where they are not in conflict with the general law, and are to be strictly followed.⁷ If the intention is apparent that the board shall always be kept full, no proceedings can be taken by the trustees or any of them while a vacancy exists.⁸

¹ *Knapp v. Railroad Co.*, 20 Wall. (U. S.) 117.

² *Daniels v. Hart*, 118 Mass. 543; *Palmer v. Forbes*, 23 Ill. 301; *Wilkinson v. Fleming*, 30 Ill. 353. See *ante*, § 345.

³ A trust deed granted a first lien, privilege, and mortgage on the entire franchise, property, and all additions thereto of the said company, to secure the company's bonds. The trustees took possession for the bondholders, and a suit was afterwards brought against them, as trustees, for the purchase-price of rolling-stock used in operating the road, and for work done for and materials furnished to the company after the trust deed was executed, but before the trustees took possession. It was held that the trustees were not liable. *Wallbridge v. Farwell (sub nom. Ontario Car, &c. Co. v. Farwell)*, 18 Can. Sup. Ct. Rep. 1. Contracts made by the company, after the execution of the mortgage, cannot bind the mortgagees except with their consent, unless such a power is conferred on the mortgagor by statute. *Ellis v. Boston, &c. R. Co.*, 107 Mass. 1; *Hale v. Nashua, &c. R. Co.*, 60 N. H. 333.

⁴ *Farmers' Loan & Trust Co. v. Hughes*, 11 Hun (N. Y.), 130.

⁵ *McAllister v. Plant*, 54 Miss. 106.

⁶ *Fletcher v. Rutland, &c. R. Co.*, 39 Vt. 633.

⁷ *Macon, &c. R. Co. v. Georgia R. Co.*, 63 Ga. 103; 1 Am. & Eng. R. Cas. 290; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Pillsbury v. Consolidated European R. Co.*, 69 Me. 394. Where the mortgage provides that in case of any vacancy in the board of trustees, the remaining trustees, or trustee, shall supply the vacancy by appointment from the bondholders, the selection of persons who have procured bonds for the express purpose of qualifying themselves for the appointment will not be invalid unless fraud can be proved. *Richards v. Merrimac, &c. R. Co.*, 44 N. H. 127.

⁸ Thus, where a suit is commenced by the trustees, it does not abate by the death or resignation of one of the trustees, but must be postponed until the vacancy is filled. *Shaw v. Norfolk, &c. R. Co.*, 5 Gray (Mass.), 162.

A court of equity may, for proper cause, remove a trustee. Thus, where a court was called on, for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a non-resident trustee and appoint another in his stead, it was held that it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible; and the fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting, did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise.¹ In a New York case,² pending an action to remove the trustees under a mortgage made to secure the bondholders of a railroad, the defendants cannot, by bringing an action in another department against the prosecuting bondholders, on the theory that such bondholders are improperly resisting a scheme to which a large majority of the bondholders have assented, and which is for the best interest of all, obtain an injunction perpetually staying the action for their removal. One who has been appointed trustee cannot retain the office and at the same time incapacitate himself to discharge its duties; and therefore if, after his appointment, he moves to a distant country the court will declare his office vacated, and will enjoin him from acting further as trustee.³

A court of equity will not, however, in any case, remove a trustee without a good and sufficient cause;⁴ but if a good cause exists, the directors of the mortgagor cannot condone it. Thus, in a

¹ Ketchum v. Mobile, &c. R. Co., 2 Woods (U. S.), 532.

² Farmers' L. & T. Co. v. McHenry, 9 Abb. (N. Y.) N. Cas. 235.

³ Farmers' L. & T. Co. v. Hughes, 11 Hun (N. Y.), 130; Hughes v. Chicago, &c. R. Co., 15 J. & S. (N. Y.) 531.

⁴ Beadleson v. Knapp, 13 Abb. Pr. N. S. (N. Y.) 335. In this case it was held that a person who is trustee under two railroad mortgages will not be removed on the application of a majority in interest of the bondholders under the first mortgage, on the ground that he declines to employ the counsel for the foreclosure of the first mortgage which such majority has selected, nor be compelled to elect to act as trustee under the second mortgage only and resign his trusteeship under the first, where it is not clear but that the action of the trustee was the result of sound judgment, and

not antagonistic to the interests of any one of the bondholders. See Equitable Trust Co. v. Fisher, 106 Ill. 189; Farmers' L. & T. Co. v. Chicago, &c. R. Co., 27 Fed. Rep. 146.

Trustees are entitled to a reasonable compensation for their services; the old English doctrine was the other way, but it does not now prevail in any jurisdiction. Gilman v. Des Moines, &c. R. Co., 41 Iowa, 22; Northern Central R. Co. v. Keighler, 29 Md. 572; Barney v. Sanders, 16 How. (U. S.) 535; Blake v. Pegram, 101 Mass. 592. Services for which a trustee is entitled to compensation are to be preferred to the claims of bondholders secured by the mortgage or trust-deed. Smith v. Washington City, &c. R. Co., 83 Gratt. (Va.) 617; Nickerson v. Atchison, 3 McCrary (U. S.), 455.

North Carolina case¹ the defendant was appointed by the plaintiff company trustee of a sinking fund to pay the debts of the corporation, and it was provided in the trust deed that the moneys of said fund might be invested, in the discretion of the trustee, in such securities as the president of the company or its board of directors might recommend. The trustee, without any previous direction, loaned a portion of the money to a banking firm of which he was the senior member, and which soon thereafter became insolvent. It was held that such action constituted a breach of trust, which it was not in the power of the board of directors to condone, their relation to the company being that of an agent to his principal. If the mortgage itself provides the mode in which a vacancy may be filled, as that it shall be filled from the bondholders, it has been held that the election of persons who have qualified themselves for the purpose is valid, unless fraud was intended.² Where the mortgage provides that any vacancy in the board shall be immediately filled, this shows an intention on the part of the mortgagor that the board shall always be kept full, and the remaining trustees have no authority to take possession of the property for the breach of a condition until the vacancy has been filled. But if foreclosure proceedings have been commenced, they will not abate, but they are suspended until the vacancy is properly filled.³

SEC. 470. Foreclosure Proceedings. — In some of the States, notably in the New England States, the statute provides what the duties of a trustee shall be in cases where the company makes default in the payment of its bonds or coupons, and in those States there can be no difficulty in ascertaining the relative rights of the bondholders and the company, or the duties of the trustees as to taking possession of the mortgaged property, or bringing proceedings to foreclose the mortgage. The mortgage being made to trustees, they are of course the proper parties to bring proceedings to foreclose it; but where they unreasonably neglect or refuse to do so, upon default in the payment of either principal or interest, any one of the bondholders — unless the mortgage itself otherwise provides — may bring a bill in equity to foreclose it in his own name, for the benefit of himself and all other bondholders;⁴ and this seems to be the rule,

¹ North Carolina R. R. Co. v. Wilson, 81 N. C. 223.

² Richards v. Merrimack, &c. R. R. Co., 44 N. H. 127.

³ Shaw v. Norfolk, &c. R. R. Co., 5 Gray (Mass.), 162.

⁴ Webb v. Vt. Central R. R. Co., 20 Blatchf. (U. S. C. C.) 218; Wilmer v.

although the mortgage itself provides that the trustees shall foreclose it upon the request of a majority or any other number of the

Atlanta, &c. R. R. Co., 2 Woods (U. S. C. C.), 447; *March v. Eastern R. R. Co.*, 40 N. H. 548; *Mason v. York, &c. R. R. Co.*, 52 Me. 82. But the neglect or refusal of the trustees must be well established. *Campbell v. Railroad Co.*, 1 Woods (U. S. C. C.), 368; *Knapp v. Railroad Co.*, 20 Wall. (U. S.) 117; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459. As security for its bonds, a railroad company executed a mortgage to trustees, conditioned that, upon default in payment of interest for six months, all the bonds should become due and payable, and that, with the consent of the majority of the bondholders, the trustees might "proceed to collect both principal and interest of all such bonds by foreclosure and sale of said property;" which transaction was to be "a perpetual bar, in law and equity, against the title of the mortgagor." Default was made on certain of the bonds, but all were not presented; the holders having been informed by the company that they would not be paid. It was held that the trustees could not bar the mortgagor of its right to redeem within a reasonable time on payment of the interest due, and that the consent of a majority of the bondholders was an absolute essential to the right of the stockholders to so foreclose. *Chicago, &c. R. R. Co. v. Fosdick*, 106 U. S. 47. The stockholders of one road, who built and sold it to another company, accepting in payment therefor preferred stock of the latter company, are estopped, by having become stockholders of the purchasing company, from claiming to be stockholders of the former company and preferred creditors of the same. Having accepted interest on the preferred stock for three years, they are estopped to deny the power of the company to issue it. *Branch v. Jesup*, 106 U. S. 468. On a bill filed by the trustees to foreclose a consolidated mortgage, where there had been prior mortgages on different parts of the consolidated road, the net earnings of the road are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and

materials furnished; and if, instead of making these payments, the earnings are directed either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced. *Calhoun v. St. Louis & Southeastern R. R. Co.*, 14 Fed. Rep. 9. A railroad corporation purchased, at a foreclosure, lands previously granted to another company on conditions which had not been complied with, so that the title still remained in the United States. The purchasing corporation issued certificates of indebtedness to bondholders, entitling them to shares of the land when it should be acquired by the corporation. Before it was so acquired, trespassers cut off valuable timber. It was held that the corporation was not liable in consequence to a bondholder, in the absence of evidence of the corporation having profited from the timber so cut. *Beecher v. Chicago & Northwestern R. R. Co.*, 14 Fed. Rep. 211. Where a railway corporation, through its board of directors, entered into a contract for the construction of a part of its road with certain persons, some of whom were directors of the company, and, in pursuance of that contract, executed its bond in a large sum, secured by mortgage upon its property, it was held that, although the contract be declared void, yet the corporation, being itself a party to the fraud, could not maintain a bill to set aside and cancel the mortgage as a cloud upon its title. *Lewis v. Meier*, 14 Fed. Rep. 311. Under Ark. acts of 1868 and 1869, extending State aid to railroad companies, the defendant corporation received State bonds, which it indorsed and negotiated. Upon a suit by a *bona fide* holder of such bonds, it was held that the acts created a statutory mortgage on the road and its income, revenues, and earnings; that the lien took effect from the date of the award of the loan by the railroad commissioners; that the 'governor's duty' in issuing the bonds was ministerial; that all persons were bound to take notice of the existence

bondholders.¹ The only prerequisite is that the bondholders bring the bill shall be *bona fide* holders of bonds, and if they are held as collateral security for a debt due them from the company, they can only have a decree for the sum actually due.² The trustees may, after proceedings have been instituted to foreclose a mortgage by individual bondholders, ask leave to come in and prosecute the suit; and unless their interests are adverse to those of the bondholders, they will generally be allowed to do so, and from that time they have entire control of the suit³ and may dismiss or prosecute it in that court, at their discretion. Where a mortgage is made to the bondholders themselves by name, *all* the bondholders must be joined as plaintiffs, and no one of them can bring a bill for himself and all others who choose to join.⁴ The other bondholders should be parties. The adequacy of the security being doubtful, each should be present to defend his own and, if necessary, attack the claims of

of the lien and of when it attached; that the lien was primarily a security for the holders of the bonds; that, as between the State and the company, the company was the principal debtor, the position of the State being like that of an accommodation indorser; that, whether the bonds were or were not valid obligations as against the State, the company, having indorsed and negotiated them, was bound upon them to *bona fide* holders, who could avail themselves of the lien. *Tompkins v. Little Rock, &c. R. R. Co.*, 15 Fed. Rep. 6.

¹ *Alexander v. Central, &c. R. R. Co.*, 3 Dill. (U. S. C. C.) 487. In a Massachusetts case — *First National Fire Ins. Co. v. Salisbury*, 130 Mass. 303 — a railroad corporation mortgaged its property and franchise to trustees, to secure the payment of certain bonds, by an instrument which provided that until default the corporation should remain in possession; that if the bonds were paid the conveyance should be void; and that, on default of the payment of the principal and interest on any bond, and on request of one half in amount of the holders of the bonds, the trustees should sell the property and apply the proceeds to the payment of the bonds. It was held that, on default in the payment of interest, the trustees had the power to foreclose and take possession of the property, though not requested so to do by one half in amount of the bondholders.

It was also held on demurrer that a bill brought by less than one sixth in amount of the holders of the bonds secured by a railroad mortgage, against the trustees thereunder, to compel them to take possession, alleged a default in the payment of interest; that the corporation had signified a purpose not to pay interest unless the holders of the bonds would take a rate less than that specified therein; that its net income was sufficient to enable it to pay interest; that it was applying the income to unsecured debts; and that there was danger that, if this course continued, the property would be inadequate security for the payment of the mortgage; and that in such suit other holders of bonds of the same issue will be allowed to come in as plaintiffs. Second-mortgage bondholders are not necessary parties, the trustees being the same under both mortgages. And it is no defence to the bill that litigation may be necessary to ascertain what property is covered by the mortgage, or that a great burden and personal liability for injuries done and debts subsequently incurred will thereby be imposed upon such trustees.

² *Jessup v. City Bank*, 14 Wis. 331.

³ *Richards v. Chesapeake, &c. R. R. Co.*, 1 Hughes (U. S. C. C.), 28.

⁴ *Railroad Co. v. Orr*, 18 Wall. (U. S.) 471.

others. If successful in the latter, his own security is enhanced. All interested, having notice, could endeavor to have, as advantageous sale as possible. Even in equity, a suit on a written instrument must be brought in the name of all who are formal parties to it and retain an interest in it. The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: 1. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. 2. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party; but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. 3. Where he is not interested in the controversy between the immediate litigants, he may be a party or not, at the option of the complainant.¹ But in all other cases all should be parties plaintiff or defendant. Persons not in interest, or who are strangers to the cause, cannot be heard either by motion or petition; but in the foreclosure of railway mortgages by the trustees, the suit being really for the benefit of the bondholders, they are regarded as *quasi* parties, and an exception to the rule is made in their favor;²

¹ Williams v. Bankhead, 19 Wall. (U. S.) 563.

² Anderson v. Jacksonville, &c. R. R. Co., 2 Woods (U. S. C. C.), 628. In a New York case H.'s complaint in equity alleged that in 1874 the A. railroad company issued \$1,000,000 of \$1,000 bonds, maturing in 1904, whereof he owned thirty-six, on each of which the E. railway company guaranteed to the bearer "the due and punctual payment of the interest thereon;" that since November, 1876, no interest had been paid thereon; that the A. had become insolvent and its property and franchises sold under foreclosure; that in an action by the People the E. had been dissolved for insolvency, its property being sold to trustees on foreclosure, and afterwards, in pursuance of a plan under N. Y. Laws, 1874, ch. 430, transferred to a new corporation, the N.

railroad company; that several millions of property of the E. not included in the mortgage foreclosed was sold under the mortgage foreclosed to H.'s prejudice (setting forth the pleadings and judgments in said suits); that said E. property not included in the mortgage foreclosed constituted a trust fund to be applied to pay the interest on the A. bonds through the guaranty; and that the foreclosure proceedings and those in the People's suit, so far as they ratified the sale of property not included in the mortgage, were fraudulent and void; and that the court rendering the judgment had no jurisdiction. The complaint prayed that all orders and decrees in those two actions be set aside so far as they affect said property, and that it be distributed among H. and others to the extent of their interest in the bonds. It was held: 1. That the debtor corporations should

but except where the officers and managers of the company are fraudulently colluding with the stockholders of the company, or are acting adversely to the interests of the corporation,¹ or where the officers of the company fraudulently refuse to attend to the interests of the corporation,² a mere stockholder cannot intervene either by cross-bill or otherwise. But in the latter case a court of equity will permit a stockholder to become a party defendant for the protection of his own interests against improper claims.

Prior mortgagees of a railroad are not necessary parties to a proceeding to foreclose a subsequent mortgage,³ because their lien upon the property cannot be defeated by any decree in such suit.⁴ But where it is sought to foreclose a junior mortgage and sell the road thereunder, and it is desirable to quiet all outstanding titles, the prior mortgagees should be made parties to the bill.⁵ Subsequent mortgagees may be made parties to a bill to foreclose a prior mortgage, and must be if it is desirable to cut off their right to redeem;⁶ but as the title stands upon the order in which conveyances were made, whether by act of the parties⁷ or by operation of law, it follows that a subsequent mortgagee, by first foreclosing his mortgage, obtains no superior rights over a prior mortgagee; and the same is also true as to judgments. Priority of lien is obtained by prior-

have been made parties, the default occurring before their insolvency. 2. That H. was not entitled to the relief, not having exhausted his legal remedy. 3. That the court had jurisdiction in both the foreclosure and the People's suit; the subject-matter had been adjudicated therein, leaving under this complaint no cause of action. *Herring v. New York, Lake Erie, &c. R. R. Co.*, 63 How. Pr. (N. Y.) 497. In another case, upon proceedings to foreclose a mortgage given to secure railroad bonds, a plan was adopted, with the assent of a majority of the bondholders, for the formation of a new corporation. Petitioners, a minority of the bondholders dissenting from the plan, charged an unjust discrimination against such minority, and that the trustee under the mortgage was acting in the interest of the majority, and that the receiver had been allowed improper compensation and expenditures, and prayed to be made parties to the foreclosure suit, for the purpose of presenting charges against the receiver

and his account. It was held that they were entitled to be made parties for this purpose. *Ex parte De Betz*, 9 Abb. (N. Y.) N. Cas. 246. Senior mortgagees will not be permitted to become parties to a suit for the foreclosure of junior mortgages to secure railroad bonds, nor will they be allowed to contest the accuracy of the judgment entered in such suit, providing for a reorganization of the road, their rights not having been affected. *Ex parte McHenry*, 9 Abb. (N. Y.) N. Cas. 256.

¹ *Forbes v. Memphis, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 323. But see *Choteau v. Allen*, 70 Mo. 290.

² *Bronson v. La Crosse, &c. R. R. Co.*, 2 Wall. (U. S.) 283.

³ *Pittsburgh, &c. R. R. Co. v. Marshall*, 85 Penn. St. 187.

⁴ *Young v. Montgomery, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 606.

⁵ *Jerome v. McCarter*, 94 U. S. 734.

⁶ *Searles v. Jacksonville, &c. R. R. Co.*, 2 Woods (U. S. C. C.), 621.

⁷ *Jerome v. McCarter, ante*.

ity in the order of time in which the respective liens attach, and the plaintiff in a subsequent judgment, by first issuing execution and selling the property, acquires no priority or advantage over the holder of a prior judgment, where nothing remains to be done to perfect the lien under the latter.¹ The indorsers of bonds secured by a railway mortgage, whether individuals or a State, have such an interest in the subject-matter of the suit that they should be made parties to a suit to foreclose. But in the absence of any statute authorizing a suit against the State, the lack of authority to sue the State is a sufficient excuse for not making it a party to such a proceeding.²

SEC. 471. *Decrees in Foreclosure Proceedings.* — A decree of a court of equity made by the consent of the parties has no greater force than an *ex parte* decree, and is subject to revision by the court at any time before it has been executed, upon proper application to that end. Such a decree has full legal effect so long as it stands, but it is not a judicial decree in the full sense of the term, but rather a judicial confirmation of an agreement of the parties.³ But when such decree has been executed, the court has no power to change it.⁴ But if a decree entered by consent goes beyond the scope of the bill, it will only be binding as to that portion of it which is within the scope of the bill.⁵ If the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by it as if they had been made parties, unless they can show some fraud practised upon, or connived at, by the trustees themselves,⁶ especially where the bondholders were cognizant of the proceedings, appeared in the cause, and sought and obtained certain orders therein, and were heard from time to time upon questions affecting their interests.⁷ The fact that some

¹ *Bronson v. La Crosse, &c. R. Co.*, 2 Wall. (U. S.) 283; *Howard v. Milwaukee, &c. R. Co.*, 7 Biss. (U. S.) 73.

² *Davis v. Gray*, 16 Wall. 203; *Young v. Montgomery, &c. R. Co.*, 2 Woods (U. S.), 606. When the United States holds a lien upon a railway which is covered by a mortgage, it seems that, even though it cannot be made a party defendant, yet its equities may be quieted by proper notice of such foreclosure proceedings. *Elliott v. Van Voorst*, 3 Wall. Jr. (U. S.) 299. It goes without saying that a decree rendered without proper notice to parties to be affected

thereby is void. *Central Trust Co. v. Florida R. & Nav. Co.*, 43 Fed. Rep. 751.

³ *Vt. & Canada R. Co. v. Vt. Central R. Co.*, 50 Vt. 500; *Union Bank v. Martin*, 3 La. An. 54.

⁴ *Wadhams v. Gay*, 73 Ill. 415.

⁵ *Vt. & Canada R. Co. v. Vt. Central R. Co.*, 50 Vt. 500.

⁶ *Campbell v. Texas, &c. R. Co.*, 1 Woods (U. S.), 368.

⁷ *Huntington v. Little Rock, &c. R. Co.*, 3 McCrary (U. S.), 581; 16 Fed. Rep. 906.

of the trustees are bondholders is not of itself sufficient to render them incompetent to consent to a decree.¹ A former decree between the same parties and upon the same subject-matter is final as to all questions which were or might have been investigated in that suit, unless it appears that by some wrong act of the successful party his adversary has been deprived of his right to fully present his case.² A decree of court declaring the mortgages executed by a railway company to be the first lien on its property and franchises does not give them precedence over the prior lien of a party who had no notice of the proceedings and was not a party nor privy to the decree.³ An action for foreclosure is a proceeding in the nature of a remedy *in rem*, and not *in personam*; therefore the trustees have no right to a personal judgment, to be enforced by execution, for any deficiency in the indebtedness left after exhausting the securities and applying their proceeds. The effect of the judgment rendered in such an action is to determine the amount of the mortgage debt, so as to know how much of the security will be required to satisfy it.⁴ When a foreclosure suit has proceeded to decree *pro confesso* and an order of reference has been made, and the mortgaged premises are then sold, though the purchaser will be admitted as a party defendant, he will not be permitted to answer. He may be present at the taking of the account and avail himself of all the defences which the mortgagor could, after the decree *pro confesso* against him.⁵ A course of procedure prescribed by the mortgage, to be pursued in case of a sale by the trustee without foreclosure, is not binding upon the court in proceedings to foreclose such mortgage. Therefore, upon a foreclosure sale, the court is not bound to adopt the provisions of the mortgage as to the application of the bonds upon the bid of a purchaser, or as to the proportion in which such bonds shall be so received, or as to the manner in which their value shall be ascertained. A provision in the decree that the purchaser, after the payment of a certain specified amount in cash, could pay the balance of his bid in outstanding bonds and coupons, secured by the first mortgage, "at such percentage of the face value thereof as this court shall, at the approval of said sale, authorize and

¹ Shaw v. Railroad Co., 100 U. S. 605.

⁴ Welsh v. St. Paul, &c. R. R. Co., 25

² Brooks v. O'Hara Bros., 2 McCrary (U. S. C. C.), 644; Woods v. Pittsburgh, &c. R. R. Co., 99 Penn. St. 101:

Minn. 314.

⁵ Hewitt v. Montclair R. R. Co., 25 N. J. Eq. 100.

³ Pittsburgh, Cincinnati, &c. R. R. Co. v. Marshall, 85 Penn. St. 187.

direct," is not erroneous, and is similar to that inserted in all railroad mortgage foreclosure sales entered in the seventh circuit.¹

SEC. 472. Vacation of Decree.—A decree will not be vacated except upon proceedings to that end brought by a party in interest, nor then, except for good and sufficient cause. Thus, a purchaser at a receiver's sale of a railroad, who, on the ground of the interest thereby acquired, was admitted as a defendant in a suit to foreclose a first mortgage on the property of the railroad, but with the right only to appear at the taking of the account of the amount due on the mortgage, and to be notified of the taking of the account (a decree had been made that the complainants were entitled to a sale of the mortgaged premises to pay the amount due thereon), but who, before the master's report was made, had lost all his interest in the mortgaged premises by reason of a sale thereof under foreclosure of a second mortgage, has no interest in the suit to entitle him to have the final decree therein opened, and the execution set aside, because he was not notified of the taking of the account.² So where a bill was filed in the Supreme Court of the District of Columbia, in behalf of some of many bondholders under railway mortgages, impeaching the proceeding in a cause in equity instituted by the trustees in such mortgages in the circuit court of the United States for the western district of Texas, and the title of the purchaser, under such proceedings; and where the bill showed that the circuit court obtained jurisdiction of the cause, and that the same was still pending in the court, and that the relief which was sought could be obtained on proper application, it was held that such a bill is bad on demurrer.³ The sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors.⁴ A ruling in a foreclosure suit denying the petition of

¹ *Farmers' L. & T. Co. v. Green Bay, &c. R. Co.*, 6 Fed. Rep. 100; 10 Biss. (U. S.) 203. The decree for the foreclosure of a mortgage cannot provide for the satisfaction of a single mortgagee's claims in disregard of the interest of other bondholders. Thus, in a proceeding instituted by a single bondholder, to foreclose a mortgage securing his bonds, a decree directing a sale of the mortgaged property, free of all liens and incumbrances, to satisfy plaintiff's claims, without making provision for other bondholders,

subsequent mortgagees, and other creditors of the road, is fatally defective. *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, affirming 33 Fed. Rep. 698.

² *Ward v. Montclair R. Co.*, 26 N. J. Eq. 260.

³ *Fayolle v. Texas & Pac. R. Co.*,— Fed. Rep.—; 3 Am. & Eng. R. Cas. 532. See also *Osborn v. Michigan Air Line R. Co.*, 2 Flip. (U. S.) 503.

⁴ *Harpending v. Munson* (N. Y.), 12 Am. & Eng. R. Cas. 408.

stockholders to be made parties in the suit brought against their corporation, is not a bar to an independent suit to set aside the decree for fraud.¹ A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpoenas upon persons without the territorial jurisdiction of the court.²

SEC. 473. Floating Debt.—The court has no power to direct the payment of any portion of the floating debt of the company out of the proceeds of the sale of the property under the mortgage without the consent of the bondholders, except in so far as the same is made a prior lien upon such property.³ Thus, the president and directors of a railroad company had contracted a floating debt to pay interest on its bonds, and for supplies and repairs for which certain persons interested in the road had become individually liable. It was held in a suit in equity brought by the trustees of the first mortgage on the railroad property to foreclose the same, that the court had no power, without the consent of the bondholders, to direct the application of the income of the road to the payment of the floating debt, although it was made to appear that it could be paid on favorable terms, and that it was equitable and probably for the interest of the bondholders that such application should be made.⁴ Nor can the purchaser be made liable for the acts of the company or trustees prior to the purchase. Thus, a railway property and franchises were bought at judicial sale by H. and others, who subsequently, under the provisions of the statute, organized a railway company. It was held that the company was not liable for the operation of the road during the time intervening between the purchase and the organization of the company, unless the possession of the company was affirmatively shown. The presumption was that H., and not the company, was in possession of the road between the date of the sale and the time of filing the certificate of organization.⁵ Where a bondholder alleged that the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which, it was claimed, was a

¹ Tazewell County v. Farmer's Loan & Trust Co., 12 Fed. Rep. 752.

² Pacific R. R. Co. v. Missouri Pacific R. R. Co., 3 Fed. Rep. 772.

³ Menasha v. Milwaukee, &c. R. R. Co., 52 Wis. 414.

⁴ Duncan v. Mobile, &c. R. R. Co., 2 Woods (U. S. C. C.), 542; Hale v. Burlington, &c. R. R. Co., 1 McCrary (U. S. C. C.), 58.

⁵ Pittsburgh, &c. R. R. Co. v. Fierst, 96 Penn. St. 144.

necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, it was held that it was competent for the trustee to file a bill to foreclose for the interest due; and that the plaintiff ratified the action of the trustee by filing and proving with the master more than one-third of the bonds issued.¹ In an English case railway debentures were granted, by which the "undertaking and all tolls and sums of money arising by virtue of the act, and all estate, right, and interest of the company" were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the company, and afterwards, by authority of an act of Parliament, the railway was sold and the purchase-money paid into court. It was held that the debentures, being prior in date, had priority over the judgments as against the purchase-money.² Where a railroad mortgage has been foreclosed and the road bought in for the benefit of the bondholders, most of whom united in organizing and carrying on a new corporation, and afterwards certain creditors, by judgments subsequent to the mortgage, succeeded in obtaining a decree on a bill filed to set aside the foreclosure and subject the property to payment of their judgments, it was held that the decree rendered the foreclosure invalid only as to the creditors who filed the bill; and those who took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit.³ In the division of the proceeds of the sale of railway property among the bondholders, the division is to be made *pro rata* according to the face of the bonds, and not according to the amount paid therefor. Thus, in a New York case,⁴ upon a suit to foreclose a mortgage given by a railroad company, A. produced bonds to the amount of \$810,000, which were issued to him as security for previous advances amounting to \$81,000 expended in the construction of the road. The statute under which the mortgage was made empowered the company to borrow such sums of money as might be necessary to complete and operate the road, and to issue bonds secured by mortgage to secure the payment of any debt thus contracted. At the time of the advances A. was president of the company. It was held that he was entitled to share in the distri-

¹ Credit Co. v. Arkansas Central R. R. Co., 15 Fed. Rep. 46.

² Furness v. Caterham Ry. Co., 27 Beav. (Eng. Ch.) 358.

³ Barnes v. Chicago, &c. R. R. Co., 8 Biss. (U. S. C. C.) 514.

⁴ Duncomb v. N. Y. & Housatonic R. R. Co., 84 N. Y. 190.

bution on the basis of \$810,000, and not of \$81,000, as held by the referee, and that it was immaterial that the pledge was taken for an antecedent debt.¹

SEC. 474. Decrees ordering Sale of Road in different States.—Where a mortgage is executed by a railway company upon a railroad situated in several States, it may be foreclosed in any one of them; and a decree entered in such suit ordering a sale of the entire road will be operative in the other States,² except as to such liens upon the road as have been created under the laws of such other States.³

SEC. 475. Statutory and other Liens.—Where the statute gives to certain creditors a lien upon the property of a railway company, in preference to mortgage or other incumbrances, these liens must be discharged before the mortgagee can take a clear title. It will not be advisable to refer to these statutes specifically, as they are widely different in their provisions; and the practitioner will always find it advisable to consult the statute itself, rather than a general treatise, to ascertain the exact rights of the parties so far as these statutes affect them. These statutes are personal, and exist in favor of the particular classes of indebtedness named, and of the persons to whom the indebtedness accrues, and if transferable at all, can only be transferred by the person in whose favor it accrues, and cannot be transferred by the company to a person from whom it borrows the money to discharge the lien.⁴ So, independently of any

¹ But see *Rice's Appeal*, 79 Penn. St. 168; *Jessup v. City Bank*, 14 Wis. 331; *Ackerson v. Ladi Branch R. R. Co.*, 28 N. J. Eq. 542.

² *Blackburn v. Selma, &c. R. R. Co.*, 2 Flip. (U. S. C. C.) 525; *Hurd v. Savannah, &c. R. R. Co.*, 12 S. C. 314; *Randolph v. Wilmington, &c. R. R. Co.*, 11 Phila. (Penn.) 502; *Wilmer v. Atlantic, &c. R. R. Co.*, 2 Woods (U. S. C. C.) 447; *McElrath v. Pittsburgh, &c. R. R. Co.*, 55 Penn. St. 189; *Muller v. Davis*, 94 U. S. 444.

³ *Hurd v. Savannah, &c. R. R. Co.*, ante. See also *Taylor v. Atlantic, &c. R. R. Co.*, 55 How. Pr. (N. Y.) 275; 57 id. 26; *United States, &c. Co., in re*, 55 How. Pr. (N. Y.) 286; 57 id. 16.

⁴ *Cairo, &c. R. R. Co. v. Fackney*, 78 Ill. 116. Interest on bonds secured by a statutory lien has priority over bonds

secured by mortgage. *Gibbs v. Greenville, &c. R. R. Co.*, 13 S. C. 228. See *Colt v. Barnes*, 64 Ala. 108, as to a statutory lien given to the State as indorser of the bonds. The charter of a railroad company made a certain debt a lien upon the property of the company. Afterwards the company, under a resolve, issued other bonds, secured by first mortgage, for a specified amount, greater than that of the outstanding lien debt, to be substituted for the lien debt. After the substitution was made a surplus of bonds remained in the hands of the company. Still later a second mortgage was made to secure bonds issued to meet later obligations. It was held that, as against holders of the second-mortgage bonds, the first-mortgage bonds, issued in excess of the amount of the original lien debt, but within the limit imposed by the resolution, and used as

statute, vendors of land to the company have a lien for the purchase-money due therefor, in all cases where such lien would exist against an individual, and this lien is prior to any mortgage which the com-

collateral, constituted a prior claim against the company's property, although such excess was issued after the issue of the second-mortgage bonds; and that first-mortgage bonds, used to take up the original lien debt, and afterwards coming to the hands of the company by way of purchase, and not for the purpose of being retired, also constituted a claim prior to that secured by the second-mortgage bonds. *Claffin v. South Carolina R. R. Co.*, 4 Hughes (U. S. C. C.), 12. One who, at the request of the bondholders, pays a debt of a railroad company, due for construction, cannot claim a superior equity to theirs, unless he can prove inducements and dealings of such a character as to estop them from asserting their liens as superior to his claim. *Kelly v. Green Bay & Minnesota R. R. Co.*, 10 Biss. (U. S. C. C.) 151. Where the statute gives the State a lien upon a railway, to secure certain indebtedness resulting from the issue of the bonds of the State to it, and the statute also authorizes the company to mortgage its road for a like amount to trustees to pay the State, etc., the State cannot be compelled to give up its lien until all its liabilities on account of the road embraced in the lien have been discharged. Thus, between 1854 and 1857, bonds of the State of Missouri, to the amount of \$3,000,000, were issued as a loan of credit to the Hannibal & St. Joseph R. R. Co. It was conditioned that the company should provide for the payment of principal and interest, and that the amount should constitute a first lien on the road. Missouri Act of February 20, 1865, authorized the company to issue bonds to a like amount, to convey its property to trustees to secure payment of the bonds, and authorized the trustees to pay to the State "a sum of money equal in amount to all indebtedness due or owing by said company to the State by reason of having issued her bonds and loaned the same to said company, . . . together with all interest that has, or may, at the time when such payment shall be made, have accrued and remain unpaid

by said company," and made it the duty of the governor, upon the fact of payment being certified to him, to assign to the trustees the lien of the State. It was held that the governor was not bound to assign the lien upon payment by the trustees of \$3,000,000, and of one instalment of interest then due, but that the State was entitled to receive an amount sufficient to cover outstanding coupons, although not due, as well as all other indebtedness for which the State was liable; that, although the governor might sell the road unless this was done, notwithstanding that \$3,000,000 had been paid as aforesaid, yet that the State was bound, under Missouri Act of March 26, 1881, — passed in anticipation of such payment, — to apply the amount to the payment of certain outstanding State bonds specified in the act, which application would enure to the benefit of the railroad company; that said act of 1865, empowering a release as aforesaid, was not repealed nor rendered nugatory by the Missouri Constitution of 1875, which prohibited the alienation of the State's lien upon any railroad. *Ralston v. Crittenden*, 3 McCrary (U. S. C. C.), 332. The property of the Atlantic, Mississippi, & Ohio R. R. Co. was ordered to be sold under a decree foreclosing a mortgage. A postponement of the sale was asked for, on the ground that the company's affairs were becoming more prosperous; but no tender of the debt was made, nor was it in the power of the company to make such tender. It was held that a postponement should not be granted, it being apparent that, even should the company's affairs continue equally prosperous, it would take ten years to pay the overdue interest, and that the direction that the sale be made for cash would not be modified; that, if it should appear after the sale that, by such direction, bidders were kept away, a resale, on different terms, could then be asked for. *Duncan v. Atlantic, Mississippi, &c. R. R. Co.*, 4 Hughes (U. S. C. C.), 125.

pany can give.¹ Whether such an equitable lien exists or not as against a mortgagee in a given case is a question which must be determined by the facts of each case; and it is for the court to say whether the acts of the vendor have been such as to postpone his lien to the mortgage.² Such mortgages have priority over the liens of subsequent judgment creditors,³ and if such judgment creditors attempt to levy upon property specifically embraced in the mortgage, they will be restrained upon application of the mortgagees;⁴ and this is so, even though the mortgage has not been recorded as required by law, if the creditor had actual notice of its existence before his lien was created.⁵ Where the trustees who have taken possession of a railway under a mortgage, and operated it, or where a receiver has done so, and a portion of the road is leased to the mortgagor, the lessor has a lien prior to the mortgage for the rent accruing under such lease.⁶

Where the vendor of rolling-stock or other personal property sold to the company, retains title in himself until full payment of the purchase money, no encumbrance which the company may place on its property can secure a lien prior to that of the vendor. But the vendor's lien in such cases does not extend beyond the specific property sold by him, and the title to which he retains; as to other property of the company he stands as a mere general creditor.⁷ A failure to

¹ *Anderson v. Pensacola, &c. R. Co.*, 2 Woods (U. S.), 628; *Florida v. Anderson*, 91 U. S. 667.

² *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138; *Carpenter v. Black Hawk, &c. Co.*, 65 N. Y. 43; *Pierce v. Milwaukee, &c. R. Co.*, 24 Wis. 551.

³ *Legg v. Mathieson*, 2 Giff. 71.

⁴ *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. App. 201. Whether the debt secured by the mortgage is due or not, — *Wildy v. Mid-Hants Ry. Co.*, 18 L. T. N. s. 73.

⁵ *Butler v. Rahm*, 46 Md. 541.

⁶ *Miltenberger v. Logansport R. Co.*, 106 U. S. 286. See also *Sage v. Central R. Co.*, 99 U. S. 334; *Hale v. Frost*, 99 U. S. 389.

⁷ *Fosdick v. Schall*, 99 U. S. 235; *Huidekoper v. Locomotive Works*, 99 U. S. 258. See *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105. Such conditional sales of personal property are valid in Missouri. *Rogers' Locomotive Works*

v. Lewis, 4 Dill. (U. S.) 158. An instrument conveying certain cars construed to be a mortgage and not a conditional sale, and therefore held to require registry, under the Missouri statute, to protect the property therein mentioned from the creditors of the grantee. *Herryford v. Davis*, 102 U. S. 235; 2 Am. & Eng. R. Cas. 386. In the case of *Central Trust Co. v. Marietta, &c. R. Co.*, 48 Fed. Rep. 865; 2 U. S. App. 120; 1 C. C. A. 130, a railroad company issued equipment bonds, and executed a mortgage to secure the same, covering "all after-acquired property" of the company. Afterwards an improvement company interested in the railway company purchased certain rolling-stock from a car-building company, which, by the contract of sale, retained title to the rolling-stock until the purchase-price should be fully paid. The improvement company then furnished this rolling-stock to the railroad company under an agreement by which the improvement company

record the reservation of title as required by the statute does not affect the rights of the vendor as against the company; the requirement is intended only for the protection of third parties.¹

SEC. 475 a. **Priority of Liens and Claims.**—It is a fundamental proposition in this connection that fixed legal rights acquired under a mortgage cannot be impaired by any equities subsequently arising. The earlier cases applied with much strictness the maxim of the common law, *qui prior est in tempore, prior est in jure*. In a case before the Federal Supreme Court,² one who had furnished the iron used in the construction of a portion of the road, claimed an equitable lien therefor in preference to an existing mortgage, basing his claim on the ground that his equity was superior and, on the principle of equitable estoppel, should take precedence over the mortgagee's claim; and that but for the material furnished by him the road could not be operated,—that his claim rested on the same basis as that of the last creditor who furnishes supplies and repairs for the salvation of a ship on the voyage. The court, however, refused to recognize such a preference, repudiating the analogy between the claimant's case and that of one furnishing supplies to a ship.³ In a similar case in Alabama,⁴ the plaintiff, having made necessary repairs

undertook to equip the railroad. In a suit to foreclose the mortgage it was held that the car-building company, having no notice of other equities, was entitled to intervene and assert its title to the rolling-stock and to secure possession thereof. See this case also in 48 Fed. Rep. 864; 2 U. S. App. 95; 1 C. C. A. 133, as to various other particular questions arising under the facts stated. In Illinois, it is held that the real owner of personal property, who vests another, to whom it is delivered, with an interest therein, must, if desirous of preserving a lien on it, comply with the requirements of the chattel-mortgage act of that State. *Hervey v. Locomotive Works*, 93 U. S. 664. And it seems that a chattel mortgage upon after-acquired goods will hold against a purchaser with notice; he can acquire no better title than his vendor. *Robson v. Mich.* Central R. Co., 37 Mich. 70. In Pennsylvania, it is held that mortgages of personal property of a railway company, out of possession, are to be postponed to creditors who have obtained a lien by

judicial process. *Merchants' Bank v. Pittsburg R. Co.*, 12 Phila. (Penn.) 482.

¹ *Central Trust Co. v. Marietta, &c. R. Co.*, 48 Fed. Rep. 868; 2 U. S. App. 95.

² *Galveston, &c. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 482.

³ The Alabama court, referring to the same comparison, observes: "A ship far from home, in distress, and without resource, must perish, and perhaps her crew with her, if a bottomry bond given them for repairs and supplies is not given precedence of other liens upon the vessel. But the court does not consider a railroad on *terra firma* so beyond the reach of help from those who own it, or are concerned in it, as to justify the adoption in such a case of the rule relating to a ship abroad, and about to perish." *Meyer v. Johnston*, 53 Ala. 345.

⁴ *Meyer v. Johnston*, 53 Ala. 345. The opinion in this case is lengthy and deals exhaustively with the question of preference. The principle was that the plaintiff, a junior mortgagor, had no more right to make repairs and claim a preference for

on the road under a contract with the company giving him a lien on the road for the amount due him, sought to be preferred to the holders of a mortgage executed prior to the making of the repairs. It was urged that if the expenditure had not been made, a court of equity would have authorized a lien upon the property for the purpose of making it available, and that therefore the court should not decline to approve and ratify what had been done voluntarily, and to protect those who had furnished money to preserve the road. But the court refused to recognize his preference. The same ruling has been made in other cases.¹ On the same principle, one who has

them over all other claims than did the first mortgagor or any stranger. As denying a preference in a similar case, see *American L. & T. Co., v. East & W. R. Co.*, 46 Fed. Rep. 101 (materials furnished for original instruction).

¹ *Reyburn v. Consumers' Gas Co.*, 29 Fed. Rep. 561; *Wood v. Guarantee Safe Dep. Co.*, 128 U. S. 416; *Porter v. Pittsburgh Steel Co.*, 120 U. S. 649; 122 U. S. 267; 30 Am. & Eng. R. Cas. 495; *Hervy v. Illinois Midland R. Co.*, 28 Fed. Rep. 169.

Thus, in *Dunham v. Cincinnati, & C. R. Co.*, 1 Wall. (U. S.) 254, the court held that a mortgage by a railway company of its road "built and to be built" — the road at this time being only partially constructed — has precedence, even as regards the then unbuilt part, of the claim of a contractor who, on the inability of the company to finish the road, had finished it himself under an agreement that he should retain possession of the road and apply its earnings to the liquidation of the debt due him, and who had never surrendered the possession of the road to the company. *Citing Pierce v. Emery*, 32 N. H. 484; *Pennock v. Coe*, 23 How. (U. S.) 130, and other cases. See also *in re Kelly*, 5 Fed. Rep. 846; *Davenport v. Receiver's*, 2 Woods (U. S.), 519. So in the case of *Deniston v. Chicago, & C. R. Co.*, 4 Biss. (U. S.) 414, the court held that a claim for materials furnished, was not entitled to preference over first mortgagees in the distribution of funds arising from a sale made at the instance of such mortgagees; nor did a promise by the receiver to pay such claims alter the case. See same principle in *United States v. Cent. Pacific R.*

Co., 138 U. S. 84. In *N. J. Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 358, the president and directors of the railway company advanced money to pay for rolling-stock leased to the company, to be paid for by instalments, and to remain the property of the vendor until payment of the entire purchase-price had been made. They did this to preserve the property for the benefit of the company and its creditors, with an understanding on their part that upon the payment of the balance due on the rolling-stock it should become their property. Some months afterwards, a foreclosure suit having been brought and a receiver appointed, they petitioned that they might be subrogated to the rights of the vendors of the rolling-stock to the extent of the advances made by them on account of it, and that the receiver should be required to pay them the amount so advanced with interest. The court denied the petition, because there could be no subrogation except upon an express agreement for the right, either with the debtor or creditor, and because the right could not be enforced until the whole debt was paid. An additional reason for denying the preference was that the payment of their claims by the receiver was in no way necessary for the preservation of the property or the protection of the mortgagees or other creditors. *Compare Farmers' L. & T. Co. v. Vicksburg, & C. R. Co.*, 33 Fed. Rep. 778, where the equity was allowed in favor of claims for improvements, such improvements having been shown to be necessary. See also as to the principle of the text. *Dexterville Mfg. Co. v. Case*, 4 Fed. Rep. 873; *Olyphant v. St. Louis, & C. R. Co.*, 28 Fed. Rep. 729; *Central Trust Co. v.*

loaned money to the company to enable it to pay the interest on its coupon bonds, has no equity entitling him to be paid out of the funds in the hands of the receiver of the road appointed in behalf of the mortgage bondholders.¹ In a recent case before the Circuit Court, the bill seeking a foreclosure alleged the insolvency of the corporation and the insufficiency of its assets to pay its mortgage bonds. The company denied the validity of its bonds, and in the course of the litigation moved the court to order the receiver to pay certain sums to its counsel for services rendered and to be rendered; also to pay certain office expenses, including the salary of its secretary, claiming that such payments were absolutely necessary to preserve the corporate existence and to enable it to defend the suit. The court, however, refused the motion on the ground that as the bonds were *prima facie* valid, the holders were entitled to all the assets, and to make such payments would be to impair their vested rights.²

But since the case of *Fosdick v. Schall*,³ if not before, the courts

East Tennessee, &c. R. Co., 30 Fed. Rep. 895.

A mere general creditor whose claim is not such as to give him any superior equity, has no equitable lien upon the income of the receivership, and the fact that the income is invested to the permanent improvement of the property creates no equitable lien in his favor to be paid out of the proceeds of the foreclosure sale of the improved property in preference to the mortgage bondholders, who have a vested lien upon the income and the property itself. *Reyburn v. Consumers' Gas Co.*, 29 Fed. Rep. 561; *in re Dexterville Mfg. Co.*, 4 Fed. Rep. 873; *Jones on Mortgage Bonds*, § 602. Compare *Gibert v. Washington City, &c. R. Co.*, 33 Gratt. (Va.) 645. Expenses for the improvement of the road, buildings, and equipments, whereby the capital stock is increased in value, cannot be included in the "operating expenses" so as to be entitled to preference over mortgage bondholders. *United States v. Central Pac. R. Co.*, 138 U. S. 84. The fact that money loaned to the company was used by it in paying the interest on first-mortgage bonds and for operating expenses, does not entitle the lender to any priority over the holder of the mortgage bonds either by way of subrogation or

on the ground of superior equities based on the theory that the interests of the public and of the bondholders were subserved by such loans or advances. *Morgan's Steamship Co. v. Texas Central R. Co.*, 137 U. S. 172.

¹ *Newport, &c. Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 714. Though if such a loan were made upon an agreement that the lender should be treated as the assignee of the holders of the coupons, it might have the effect to subrogate the lender to their rights, and entitle him to hold the coupons as part of the debt secured by the mortgage. See *Jones on Corp. Bonds*, § 252; *Ketchum v. Duncan*, 96 U. S. 662.

² *Union L. & T. Co. v. Southern California R. Co.*, 51 Fed. Rep. 106. In a proceeding to foreclose a mortgage on street-car property, the receiver will not be ordered to pay out any funds in his hands for grading the street between the company's tracks, though such paving has been ordered by the municipal authorities. Unless the town has a lien on the company's property, it must come in *pari passu* with general creditors. *Union Loan & T. Co. v. Southern Cal. R. Co.*, 49 Fed. Rep. 267. The propriety of this decision, however, is not altogether clear.

³ 99 U. S. 235, 250.

always recognize the equity in favor of claims for operating expenses, incurred during the receivership and for a reasonable period prior thereto.¹ This equity rests upon the basis that the current earnings of the road, which in all justice should have been devoted to the payment of current expenses, have been used instead for the payment of the mortgage debt or interest thereon.² "The income of a railroad company is pledged to the payment of its current expenses, and the use of any part of the earnings by the managers for the payment of the interest due to mortgage creditors, or for making permanent improvements to the property, would be a diversion of the funds, and has been so held in many cases. The employés, as well as parties furnishing supplies used and consumed in the daily operation of the road, have an *equitable lien* for the payment of their wages, which the court will enforce on proper application in foreclosure proceedings."³ It seems that one who furnishes the labor or services of others is not an employé but a contractor, within the meaning of this rule, and therefore not entitled to the equity unless it is specifically decreed in his favor.⁴

The "operating expenses" include all taxes, the wages of all employés, officers, and agents employed in operating the road, the cost of materials and supplies furnished when necessary to keep the road in a condition to be operated, and the balances due to connecting

¹ This doctrine is very clearly discussed in a number of cases which recognize and apply the equity stated. See *Kneeland v. Bass Foundry Co.*, 140 U. S. 592; *Metropolitan Trust Co. v. Tonawanda, &c. R. Co.*, 40 Hun (U. S.), 80; *Miltenberger v. Logansport R. Co.*, 106 U. S. 236; *Union Trust Co. v. Souther*, 107 U. S. 591; *Thomas v. Peoria, &c. R. Co.*, 36 Fed. Rep. 817; 36 Am. & Eng. R. Cas. 381; *Douglas v. Cline*, 12 Bush (Ky.), 608; *Taylor v. Philadelphia, &c. R. Co.*, 7 Fed. Rep. 377; *Williamson v. Washington, &c. R. Co.*, 33 Gratt. (Va.) 624; *Hale v. Frost*, 99 U. S. 389; *Finance Co. v. Charleston, &c. R. Co.*, 48 Fed. Rep. 188. In another case, wages due employés and past due for eight months, at the time of the appointment of the receiver, were ordered to be paid where the employés were retained in the service of the receiver; but payment of such claims in the hands of third parties was refused. *Skiddy v. Atlantic, &c. R. Co.*, 3 Hughes (U. S.), 320; *Duncan v.*

Chesapeake, &c. R. Co., 19 Am. Ry. Rep. 286. The equity in favor of those who furnish labor and materials which constitute a part of the operating expenses of the road extends to all the divisions of the system in the hands of the receivers, although the expenses were incurred in the operation of a single division. *Central Trust Co. v. Wabash, &c. R. Co.*, 30 Fed. Rep. 332; *Calhoun v. St. Louis, &c. R. Co.*, 14 Fed. Rep. 9. The equity attaches to the claim and not to the person of the owner of it; all the equities existing in favor of the original owner therefore pass to his assignee. *Union Trust Co. v. Walker*, 107 U. S. 596; *Burnham v. Bowen*, 111 U. S. 776. Compare *Skiddy v. Atlantic, &c. R. Co.*, 3 Hughes (U. S.), 320.

² *Fosdick v. Schall*, 99 U. S. 235.

³ *Metropolitan Trust Co. v. Tonawanda, &c. R. Co.*, 40 Hun (N. Y.), 89, BARKER, J.

⁴ *Lehigh Coal, &c. Co. v. Central R. Co.*, 29 N. J. Eq. 252.

lines on account of the transportation of through freights and passengers.¹ They include also the rental of cars used on the road,² and the payment of the annual salary of an attorney which falls due within a short time prior to the receivership. The services of an attorney are very properly considered necessary to the proper protection and administration of the affairs of the company.³ A sufficient amount

¹ *Miltenberger v. Logansport R. Co.*, 106 U. S. 288; *Farmers' L. & T. Co. v. Vicksburg, &c. R. Co.*, 33 Fed. Rep. 778; *Easton v. Houston, &c. R. Co.*, 38 Fed. Rep. 12. In the first of these cases the court observed that in view of the consequences, both to the company and to the public, involved in the breaking off of traffic relations which must ensue on a failure to pay freight and ticket balances to connecting lines, the payment of such claims "may well be placed in the category of payments made to preserve the property." A contrary view to that of the text was taken in *Jessup v. Atlantic, &c. R. Co.*, 3 Woods (U. S.), 441, where the court held that claims on the company for balances due on through transportation were mere open accounts and entitled to no preference whatsoever. But this case is no longer authority.

Taxes generally constitute a lien on the property and are entitled to preference over every claim except a claim for the costs in a judicial proceeding. *Georgia v. Atlantic, &c. R. Co.*, 3 Woods (U. S.), 434; *Central Trust Co. v. New York, &c. R. Co.*, 110 N. Y. 250, reversing 47 Hun, 587; *Stevens v. New York, &c. R. Co.*, 13 Blatchf. (U. S.) 104. The franchise and property remain taxable although in possession of the court by its receiver. *Central Trust Co. v. New York, &c. R. Co.*, 110 N. Y. 258; *Union Trust Co. v. Iron Mountain R. Co.*, 117 U. S. 434. *Compare Corn v. Lancaster Sav. Bank*, 123 Mass. 493.

An order of the court, on the appointment of a receiver, providing for the payment of wages due employes for a reasonable time prior to the receivership, is merely a personal protection granted by the court *ex gratia* to those dependent on their daily labor for support, and will not cover a claim by a merchant for rations furnished to such employes under contract

with the company for which the company alone is liable, although the company charges the rations to its laborers as part of their wages. Such a claim, however, may be given a priority over the payment of interest on the mortgaged bonds by an order of the court, and if it appear that any of the earnings have been devoted to the payment of such interest, to the benefit of bondholders, an amount equal to the money so diverted may be applied to the payment of it, out of the proceeds of the sale of the road, if the earnings are not sufficient. *Finance Co. v. Charleston, &c. R. Co.*, 49 Fed. Rep. 693; 48 Fed. Rep. 188.

² *Thomas v. Peoria, &c. R. Co.*, 36 Fed. Rep. 817; 36 Am. & Eng. R. Cas. 381. See *Wright v. Kentucky, &c. R. Co.*, 117 U. S. 72, 94; 24 Am. & Eng. R. Cas. 312; *Wardwell v. Railway Co.*, 103 U. S. 651. *Contra*, where there is no evidence to show that the bondholders were benefited thereby. *St. Louis, &c. R. Co. v. Cleveland, &c. R. Co.*, 125 U. S. 658; 33 Am. & Eng. R. Cas. 16.

But the rule of the text is true only as to rent due within six months prior to the receivership. And where it appears that the lessor and lessee company were controlled by practically the same persons, the terms of the lease will be disregarded and a reasonable rent only allowed. *Thomas v. Peoria, &c. R. Co.*, *supra*; *Thomas v. Brownsville, &c. R. Co.*, 109 U. S. 522; 16 Am. & Eng. R. Cas. 557.

³ *Blair v. St. Louis, &c. R. Co.*, 23 Fed. Rep. 521; *Bayliss v. Lafayette, &c. R. Co.*, 9 Biss. (U. S.) 90; *Bound v. South Carolina R. Co.*, 43 Fed. Rep. 404. In the case of *Gurney v. Atlantic, &c. R. Co.*, 58 N. Y. 358, reversing 2 Th. & C. (N. Y.) 446, the decree provided for the payment, out of the net earnings, of all arrearages owing to laborers and employes for "labor and services actually done in connection with

of rolling-stock being an essential to the proper and successful operation of the road, the court may order the receiver to purchase what is needed, and give to the vendor a lien on the earnings of the road which shall be prior to the claims of the first mortgages.¹ So also

the company's railways." It was held that this would include a claim of five thousand dollars for professional services as counsel, the claim having become due a short time prior to the receiver's appointment. *Compare Louisville, &c. R. Co. v. Wilson*, 138 U. S. 501, holding that the term "wages of employes" as used in a decree does not include counsel's fees.

The test is whether the services rendered were for the benefit of the mortgaged estate. Thus, where counsel was employed to recover from a lessee certain engines leased by the insolvent road, and a rental for their use, such services are entitled to payment out of the funds of the receivership, since they clearly served to add to the *corpus* and value of the estate. The court said: "We think it may fairly be held that the party who takes the benefit of such a service ought to pay for it; and that equity may properly decree payment therefor. As justly remarked by Lord KENYON, in *Read v. Dupper*, 6 T. R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained.'" *Louisville &c. R. Co. v. Wilson*, 138 U. S. 501. See also *Renick v. Ludington*, 16 W. Va. 378, 391; *Brown v. Bigley*, 3 Tenn. Ch. 623; *Mahone v. Southern Tel. Co.*, 33 Fed. Rep. 702. In *Bayliss v. Lafayette, &c. R. Co.*, 9 Biss. (U. S.) 92, *DRUMMOND, J.*, discusses this question and in the course of his opinion observes: "It is difficult to lay down any absolute rule upon this subject, and I think I can only adopt this principle: that whatever may be fairly said to be work done in the operation of the road is comprehended by the term 'labor.' It is not necessary that it should be manual in the sense of an act done by a person who works with the spade, the pick, or the hoe. It is sufficient if it be labor, and this would fairly include all services performed by any employé of

the company, for instance in making out and keeping accounts, and in doing anything necessary in the operation of the road; and in that sense I think that the services rendered by counsel, not in all cases, but in many cases, may be said to come within the meaning of the term labor." But under a statute providing for the payment of all sums due to any servant or employé of the company, it has been held that the salary of the secretary of the company was not included. *Wells v. Southern Minn. R. Co.*, 1 Fed. Rep. 270; 1 *McCrary* (U. S.), 18. Where the holder of second-mortgage bonds brings suit for the appointment of a receiver, and thereupon a receiver is appointed with the consent of all interested parties, and to the advantage of all, the services rendered by the complainant's attorneys, being for the common benefit, should be paid from the assets of the company. *Bound v. South Carolina R. Co.*, 43 Fed. Rep. 404. But an attorney is not entitled to any preference on account of money advanced by him to pay judgments against the company or claims against it for wages or for stock killed, though such advances are made under an express agreement that the amount so advanced shall be repaid by the company, and though made within six months prior to the appointment of the receiver. His position in such a case must be regarded as one who had loaned money to the company without security. *Blair v. St. Louis, &c. R. Co.*, 23 Fed. Rep. 521, 523.

¹ *Vilas v. Page*, 106 N. Y. 439; *Meyer v. Johnston*, 53 Ala. 237. But when the net earnings of the road which is in the hands of receivers are amply sufficient to pay for a necessary purchase of additional rolling-stock, the court will not authorize the receivers to raise money for the same by the creation of a car trust, in order to allow of the application of the income to the bondholders. *Taylor v. Philadelphia, &c. R. Co.*, 9 Fed. Rep. 1. An application to compel the receivers of an insolvent

the court may order him to make necessary repairs and charge the expense as a first lien on the property prior to all existing mortgages.¹

In a recent case in the United States Supreme Court, the rolling-stock, together with the whole road, being subject to a mortgage, and the levy of an execution upon the rolling-stock being threatened, the intervenor rescued the property by becoming a surety on a bond given by the company to secure an injunction against the threatened levy of execution. The injunction having been dissolved, and a judgment taken against the intervenor as surety on the bond, the court held, on an intervening petition by him in the foreclosure proceedings, that he was entitled to be paid out of the proceeds of the foreclosure sale, it appearing that the receiver had diverted the earnings of the roads to the increase of the *corpus* of the property. The equity arose from the fact that the intervenor's claim was "based upon a *bona fide* effort made by him to preserve the fund itself from waste and spoliation after the mortgage was in arrears and the right to reduce it to possession had accrued."² On the same principle, bondholders, who have advanced money for the payment of wages due employes in order to prevent a threatened strike, on an express understanding that they should be repaid out of the first net earnings of the company, are entitled to a preference over first mortgagees to the extent of the advances made by them.³

railroad company to deliver to creditors certain certificates of indebtedness, which the receivers were authorized by the court to issue, and which they had offered to such creditors in payment of rolling-stock, and which the creditors had accepted, was refused, the creditors having had it in their power to retake their property at any time, and it appearing that it would have been to the disadvantage of the trust fund for the receivers to have paid the contract price. *Coe v. N. J. Midland R. Co.*, 27 N. J. Eq. 37.

¹ *Hoover v. Montclair, &c. R. Co.*, 29 N. J. Eq. 4; *ex parte Mitchell*, 12 S. C. 83.

² *Union Trust Co. v. Morrison*, 125 U. S. 591, 612; 33 Am. & Eng. R. Cas. 33. See also *Thompkins v. Little Rock R. Co.*, 15 Fed. Rep. 6; *Kelly v. Receivers*, 5 Fed. Rep. 846.

³ *Atkins v. Petersburg R. Co.*, 3 Hughes (U. S.), 307. See *Kelly v. Receivers*, 5 Fed. Rep. 846. But the same rule does not apply to a general loan. Thus, in the

case of *Penn. v. Calhoun*, 121 U. S. 251, in a suit for foreclosure of a railroad mortgage, the court being satisfied that the money loaned to the company by a bank, an intervening creditor, at a time when the company was much embarrassed and shortly before the commencement of the suit, went into the general funds of the company and not especially to the payment of the mortgage interest, and that there was no fraud or deception on the part of trustees, and no misuse of the current income by the receiver of the road to the injury of the bank, held that the bank had only the rights of a general creditor in the distribution of the proceeds of the sale of the mortgaged property. Compare, however, *ex parte South Carolina Bank*, 18 S. C. 289; *ex parte Williams*, 18 id. 299.

In a decree of foreclosure, the court may properly order a claim for supplies furnished to the road prior to the appointment of the receiver to be paid out of the funds arising from the sale of the road, in

Claims against the railroad company for damages to passengers or to property shipped over the road, cannot be considered as operating expenses so as to be entitled to payment by the receiver under a decree directing him to pay claims for operating expenses accrued within a certain period prior to the receivership. Such claims are mere liabilities resulting secondarily from the operation of the road.¹ The underlying principle for determining when a claim is entitled to priority, and to be paid out of the receivership funds, is that it operated in a direct way, when it arose, to the advantage of the mortgagees.² It is on this principle that claims for personal or other injuries resulting from the negligence of the company in the operation of the road are not entitled to priority.³ But the rule is otherwise as to claims for such damages where the injury was inflicted during the operation of the road by the receiver. Damages for such injuries caused through the negligence of the receiver, or his agents, or employes, are classed as operating expenses, and are accorded the same priority over the claims of creditors as attaches to other necessary expenses of the receivership; they are to be paid out of the net income of the road, if that fund is sufficient, but if it is not, they must be paid out of the *corpus*.⁴ But damages

preference to the mortgage bondholders, and though the supplies were furnished while the entire system of roads was under one control, and the fund from which they were ordered to be paid arose from the sale of the main line only, it will be presumed, in the absence of anything in the record to the contrary, that the order of the court was in accordance with the law under all the facts involved. *Kneeland v. Bass Foundry Works*, 140 U. S. 592.

¹ *Easton v. Houston, &c. R. Co.*, 38 Fed. Rep. 12; *Central Trust Co. v. Wabash, &c. R. Co.*, 28 Fed. Rep. 871; 32 Fed. Rep. 566; *Central Trust Co. v. East Tenn., &c. R. Co.*, 30 Fed. Rep. 895; 30 Am. & Eng. R. Cas. 450; *Hiles v. Case*, 9 Biss. (U. S.) 549; 14 Fed. Rep. 141. A claim for damages resulting to property from fire caused by the operation of the road while in the company's hands is therefore entitled to no preference. *Hiles v. Case*, 14 Fed. Rep. 141.

² PARDEE, J., in *Easton v. Houston, &c. R. Co.*, 38 Fed. Rep. 12.

³ *Central Trust Co. v. East Tenn., &c. R. Co.*, 30 Fed. Rep. 895; 30 Am. & Eng.

R. Cas. 450. A claim against the railroad company for damages for the death of plaintiff's intestate, is a demand arising from the company's failure of duty, and from its nature could not by its creation preserve or increase the *corpus* of the company's estate, and is therefore not entitled to priority, upon foreclosure, over the rights of mortgagees. *Farmers' L. & T. Co. v. Green Bay, &c. R. Co.*, 45 Fed. Rep. 664.

⁴ *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; 25 Am. & Eng. R. Cas. 560; *Mobile & Ohio R. Co. v. Davis*, 62 Miss. 271; 26 Am. & Eng. R. Cas. 425; *Ryan v. Hayes*, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; *ex parte Brown*, 15 S. C. 518; 9 Am. & Eng. R. Cas. 723; *Klein v. Jewett*, 26 N. J. Eq. 473; *Farmers' L. & T. Co. v. Vicksburgh, &c. R. Co.*, 33 Fed. Rep. 778; *Central Trust Co. v. Wabash, &c. R. Co.*, 28 Fed. Rep. 871; 32 Fed. Rep. 566; *Central Trust Co. v. East Tenn., &c. R. Co.*, 30 Fed. Rep. 895; 30 Am. & Eng. R. Cas. 450; *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169; *Oliphant v. St. Louis, &c. R. Co.*, 28 Fed.

for injuries committed by the company prior to the appointment of the receiver cannot be classed as operating expenses, and are entitled to no such priority.¹

Judgments obtained against the company by the owners of land abutting on a street through which the road runs, for damages to their property resulting from the construction and operation of the road in the street, are entitled to priority of payment over mortgage bonds, out of the funds produced by a sale of the road to foreclose the mortgage.² The right to such priority in some of the cases was based on the ground that the State constitution provided for the payment of such compensation, and the land-owner's right to it could not be defeated by mortgaging the corporate property. But it would seem that the rule is the same whether the constitution provided specifically for such damages or not. As has been seen,³ the impairment of the abutting owner's easement in the street is a taking of private property, and compensation for such taking must be preferred to the claims of creditors. The fact that the mortgage was executed and recorded before the judgments were obtained, or the right of action for them had accrued, did not affect the priority of the abutting owner's claim.⁴

Creditors of a railroad company who take preferred stock for their claims do not thereby secure a priority over creditors whose debts were contracted subsequently; preferred stockholders are not classed as creditors.⁵

Rep. 729. Compare, however, *Davenport v. Receivers*, 2 Woods (U. S.), 519, holding that a judgment recovered by an injured passenger is not entitled to such priority over the claims of first-mortgage bondholders, unless it is so provided in the order of court appointing the receiver.

¹ *Easton v. Houston, &c. R. Co.*, 38 Fed. Rep. 12; 39 Am. & Eng. R. Cas. 588 (goods shipped lost by fire); *Hiles v. Case*, 14 Fed. Rep. 141; 9 Biss. 549 (fire set by locomotive); *Farmers' L. & T. Co. v. Green Bay, &c. R. Co.*, 45 Fed. Rep. 664; 46 Am. & Eng. R. Cas. 29 (strongly criticizing *Dow v. Memphis, &c. R. Co.*, 20 Fed. Rep. 768; 17 Am. & Eng. R. Cas. 324). Compare *Frazier v. East Tennessee, &c. R. Co.*, 88 Tenn. 138; 40 Am. & Eng. R. Cas. 358.

² *Pennsylvania Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35; 31 N. E. Rep. 38;

Mercantile Trust Co. v. Pittsburgh, &c. R. Co., 29 Fed. Rep. 372.

³ See *anti*, Chapter XIII.

⁴ *Pennsylvania Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35; 31 N. E. Rep. 38.

⁵ *Warren v. King*, 108 U. S. 389; *Chaffee v. Rutland, &c. R. Co.*, 55 Vt. 110. In this latter case the second-mortgage bondholders of the Rutland & Burlington R. Co. obtained a charter as the Rutland R. Co., and issued "preferred guaranteed stock" to liquidate the first-mortgage bonds and other claims. As dividends on this issue came due, certificates were issued. Plaintiff brought assumpsit on certificates owned by him. The court held that a preferred stockholder is not a creditor; that a right to a dividend is not a debt, and that a dividend cannot be lawfully declared until a fund exists for its payment; but that, in this case, neither

The time within which, prior to the receivership or foreclosure, the preferred claims must have arisen is generally six months; not longer than this except where extraordinary considerations demand it. The principle is that "the extent to which credit for this class of supplies is to run back is to be measured by the usual course of credit and business of the company in the conduct of its affairs, — that is, ascertaining from the proof what was the usual term of credit upon which these companies have purchased their supplies, or, as in the case of railroads, settled with their connecting lines."¹

The whole principle is that the property of an insolvent corporation is a trust fund primarily for the payment of its debts; and lien or secured creditors have no greater equity for payment of such funds than have general creditors. As both classes of creditors have contributed to the extent of their respective debts to the assets of the insolvent, in strict justice they should share *pro rata* in the distribution of the assets. The secured creditor, however, is generally entitled to priority of payment, because with an equal equity he has a legal lien which equity will recognize and enforce, — applying the old maxim, "Where equities are equal the law will prevail." Where, however, the unsecured creditor has some peculiar and superior equity, the court may establish his claim as an equitable lien on the property paramount to that of the secured debt.²

stockholders nor creditors having objected to the issue of the certificates, the validity of which had never been denied, and most of which had been converted into bonds, the company, as against the plaintiff, was estopped to deny their validity, and that the plaintiff might maintain his action, and, the certificates running to the holder, and having been always treated as if running to the bearer, the plaintiff might sue in his own name. *Chaffee v. Rutland R. Co.*, 55 Vt. 110.

¹ *Rayburn v. Consumers' Gas Co.*, 29 Fed. Rep. 564. See also *Dow v. Memphis, &c. R. Co.*, 20 Fed. Rep. 260. See also *Turner v. Indianapolis, &c. R. Co.*, 8 Biss. (U. S.) 315, where the court said that it would adopt, by analogy, the rule of the State statutes in relation to liens on railroads by mechanics and material men.

² See these principles applied in *Farmers' L. & T. Co. v. Missouri, &c. R. Co.*, 21 Fed. Rep. 265. In this case, complainants obtained a decree to foreclose a mort-

gage executed by the Missouri Ry. Co. to secure its bonds, but instead of making a sale of the property, entered into an arrangement among themselves, with the consent of all parties in interest, by which the entire property was perpetually leased to the Wabash Ry. Co. The lessee stipulated to pay to the receiver (provided by order of court for the purpose) as a rental, thirty per cent of the gross earnings of leased road as operated by it, to be applied by him to the payment of the interest on the bonds issued by the lessee and accepted in lieu of the bonds of the insolvent company, and secured by a mortgage on the whole property of the lessor; any surplus after the payment of taxes to be paid to the lessor company, thus making no provision for the payment of the floating debt of the insolvent corporation. The holders of certain unsecured notes given in liquidation of a debt growing out of the construction of a part of the insolvent's road, and to prevent a lien thereon, intervened after the fore-

Since the equity in favor of claims for operating expenses is based upon the diversion of the current earnings to other purposes, the amount to be applied in discharge of such equities must depend upon the extent of the diversion. "Whatever is done must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows then that if there has been in reality no diversion, there can be no restoration, and that the amount of the restoration must be made to depend upon the amount of the diversion."¹ But the amount devoted to these equities is not confined to the diversion made in payment of the mortgage debt or in the interest thereon; whenever it appears that the earnings of the road have been used for any purpose other than the payment of the operating expenses, the amount diverted must be restored. Thus, where the company has used the earnings of the road for making permanent improvements, or in providing additional equipments for the road, thereby leaving claims for labor and supplies used in the operation of the road unpaid, the court may direct their payment out of the income of the receivership.²

In some of the States it is provided by statute that the claims of employes and material men for labor or materials furnished in the maintenance and operation of the road shall have priority over all other creditors, even first mortgagees.³ Legislation, however, cannot

closure decree and prayed to have their debts established as equitable liens upon the property and funds of the insolvent road paramount to the lien of the mortgage. The court held that they were entitled to the lien as prayed; also that it was not necessary to the right of intervention to participate in a trust fund *in custodia legis*, that the intervenor should first establish his claim at law, or that he should have any lien upon the fund. *Farmers' L. & T. Co. v. Missouri, &c. R. Co.*, 21 Fed. Rep. 264. As to the general equity principles of the text, see *Railroad v. Howard*, 7 Wall. (U. S.) 409, 411; *in re Howard*, 9 Wall. (U. S.) 175; *Burnham v. Bowen*, 111 U. S. 776.

¹ *Fosdick v. Schall*, 99 U. S. 253, 254.

² *Poland v. Lamoyille Valley R. Co.*, 52 Vt. 144; *Williamson v. Washington City, &c. R. Co.*, 38 Gratt. (U. S.) 624. See also *in re Kelly*, 5 Fed. Rep. 846. If the receiver has diverted the earnings of the road to the payment of interest on receiver's

certificates payable out of the corpus of the mortgaged property, or to the payment of costs or allowances in the foreclosure suit, or to the payment of any other claims not properly for operating expenses, the amount so diverted must be restored to the current earnings fund, and applied to the payment of claims properly payable therefrom. *Blair v. St. Louis, &c. R. Co.*, 25 Fed. Rep. 232; *Calhoun v. St. Louis, &c. R. Co.*, 14 Fed. Rep. 9; *Jones on Mortgage Bonds, etc.*, § 591.

³ See *Williamson v. N. J. Southern R. Co.*, 23 N. J. Eq. 377, 300. The Code of Mississippi (1880, § 1033; 1892, § 839) provides that no mortgage or deed of trust upon the income, future earnings, or rolling-stock of a railroad company shall be valid as against debts contracted in carrying on its business. This, it is held, does not give a prior lien to the holders of such claims, but merely prevents those claiming a prior lien under such mortgage from setting it up to defeat such claims. *Farmers'*

affect the priority of an existing mortgage, and such statutes, therefore, can only operate as to subsequent mortgages.¹

In relation to this subject the following propositions, as stated by Mr. Justice HARLAN,² embody a summary of the principles involved.

(1) When a court of equity is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipments, or other permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable.³ (2) As it frequently happens when a railroad company becomes pecuniarily embarrassed, that debts for labor, supplies, etc., are permitted to accumulate, in order that bonded interest may be paid, and a

L. & T. Co. v. Vicksburgh, &c. R. Co., 33 Fed. Rep. 778. In this case, a company whose property was heavily mortgaged, made arrangements to operate its road in connection with other roads. The management of these roads was under the same general officers, although the business of each was kept separate. Sums were loaned by the corporations controlling the connecting lines to enable the indebted company to pay its taxes, the wages of its employes, and balances due themselves. It was held that these loans were debts "contracted in carrying on the business of the corporation" and within the protection of the statute. *Farmers' L. & T. Co. v. Vicksburgh, &c. R. Co.*, 33 Fed. Rep. 778. In Tennessee, it is provided by statute that no railroad company shall execute any mortgage on its property creating liens superior to judgments against it for injury to persons or property incurred in the operation of the road. This embraces a contract made by the company with an injured employe, whereby he was to receive a certain fixed salary for five years for such work as he was physically able to do, this contract having been made in settlement of his claim for damages. *Frazier v. East Tenn., &c. R. Co.*, 88 Tenn. 138. In Georgia, the court will allow priority only in favor of those laborers or material men who have perfected their liens according to the

statute. *Jessup v. Atlantic, &c. R. Co.*, 3 Woods (U. S.), 441.

¹ *United States v. Louisville, &c. R. Co.*, 4 Dill. (U. S.) 601, 611, holding that Congress has no authority to limit the tolls of a canal company whose revenues are pledged to secure its bonds, so as to impair the rights of bondholders. See also *Brown v. London, &c. Ry. Co.*, 9 C. B. N. s. 726; 99 E. C. L. 725; *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105, 131; *Jones on Railway Bonds*, (2d ed.) § 579.

² *Thomas v. Peoria, &c. R. Co.*, 36 Fed. Rep. 817, 818; 36 Am. & Eng. R. Cas. 381.

³ "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers, and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied." *Fosdick v. Schall*, 99 U. S. 253.

disastrous foreclosure postponed or avoided; and in this way the earnings which ordinarily should go to pay the daily expenses are kept from those to whom, in equity, they belong, and used to pay the mortgage debt, the presumption is that every railroad mortgagee impliedly agrees that the current debts, made in the ordinary course of business, shall be paid from the current receipts before he has any claim upon the income. Therefore, "the income out of which the mortgagee is entitled to be paid, is the net income obtained after deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements."¹ (3) If anything is taken from the current debt fund, and put into that which belongs to the mortgage creditors, the court may require, as a condition of an order to take possession of the mortgaged property and hold the future income for the mortgagees, that "what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees; and this, notwithstanding the mortgage may, in its terms, give a specific lien on the income of the road."² (4) If no order is made when a receiver is appointed that will, in terms, save the rights of creditors furnishing supplies, labor, equipments, etc., yet if it appears, in the progress of the cause, that the earnings of the road have been used to pay interest on the mortgage debt instead of being applied to the payment of employes and material men, as in equity it ought to have been applied, the court may use the income of the receivership to discharge obligations which, but for the diversion of the funds, would have been paid in the ordinary course of business; this on the ground that "the officers of the company are, in a sense, trustees of the earnings for the benefit of the different classes of creditors

¹ Fosdick v. Schall, 99 U. S. 252; Burnham v. Bowen, 111 U. S. 780 (equity allowed in favor of person furnishing fuel).

² For "until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company, and are subject to its control." Thomas v. Peoria, &c. R. Co., 36 Fed. Rep. 818; 36 Am. & Eng. R. Cas. 381; Union Trust Co. v. Souther, 107 U. S. 594; Miltenberger v. Logansport R. Co., 106 U. S. 311, 312; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 457; Freedman's Sav. Co. v. Shepherd, 127 U. S. 494; Sage v. Mem-

phis, &c. R. Co., 111 U. S. 362. In this last case the court quotes with approval the language of the opinion in Dow v. Memphis, &c. R. Co., 124 U. S. 654, to the effect that "it is well settled that the mortgagor of a railroad, even though the mortgage covers the income, cannot be required to account to the mortgagee for earnings while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage." Galveston, &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 483.

and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its hands as, if practicable, to restore the parties to their original rights.¹

(5) While ordinarily this power is confined to the appropriation of the income of the receivership, and the proceeds of mortgaged assets that have been taken from the company, cases may arise that will require the use of the proceeds of the sale of the mortgage property in the same way; as when, before the appointment of the receiver, or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used to make permanent improvements in the fixed property, or to buy additional equipment.²

SEC. 475 *b*. **Attachment and Execution.** — An attachment of funds belonging to a railway company, accruing from its business, when made by a creditor whose debt is properly chargeable to the expense account, will create a lien prior to the mortgage,³ if made before default has been made in the payment of the mortgage, or before possession has been taken by the trustees.⁴ If at the time a

¹ *Finance Co. v. Charleston, &c. R. Co.*, 48 Fed. Rep. 189; 49 Fed. Rep. 693; *Thomas v. Peoria, &c. R. Co.*, 36 Fed. Rep. 816; 36 Am. & Eng. R. Cas. 381; *Fosdick v. Schall*, 99 U. S. 253.

² "It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or *even out of the corpus of the property*, under the order of the court, with a priority of lien." *Miltenberger v. Logansport R. Co.*, 106 U. S. 311, 312; *Union Trust Co. v. Ill. Midland R. Co.*, 117 U. S. 457. Thus, in the case of *Thomas v. Peoria, &c. R. Co.*, 36 Fed. Rep. 808, it was held that a claim for the rent of cars may be charged upon the earnings of the receivership, or if they are inadequate, upon the proceeds of the mortgaged property. Mr. Jones, in his admirable work (*Mortgage Bonds*, § 607) observes: "It is only the income of the property while it is under the administra-

tion of the court that is subject to the order of the court for the payment of unsecured claims which the court may deem entitled to an equitable priority." But this is said in stating the general principle; further on in the same section the author states that "cases may arise that will require the use of the proceeds of the sale of the mortgaged property in the same way as when, before the appointment of the receiver or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used to make permanent improvements in the fixed property, or to buy additional equipment." *St. Louis, &c. R. Co. v. Cleveland, &c. R. Co.*, 125 U. S. 658.

³ *Clay v. East Tenn., &c. R. Co.*, 6 Heisk. (Tenn.) 421.

⁴ A levy made by a creditor after a suit for the foreclosure of prior mortgages has been instituted, does not entitle him to a preference. *Coe v. Columbus, &c. R. Co.*, 10 Ohio St. 372. See also *Nichols v. Mase*, 94 U. S. 160. And see *American Bridge Co. v. Heidelberg*, 94 U. S. 798, where it was held that the lien of the mortgage upon the income from the earn-

receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff, and there are funds derived from income, and balances due from employes, in the hands of or due to the company, the execution creditors are entitled to have these funds and balances applied to the satisfaction of their debts in preference to the trust creditors. If these funds or balances have been applied under the order of the court to other debts, they will be replaced out of the revenues received by the receiver since his appointment.¹

SEC. 476. Sale of the Road: Rights and Liabilities of Purchaser. — Where the mortgage provides for a sale of the road and property upon a default in the payment of principal or interest, but one sale is contemplated, and the entire property may be sold upon default in the payment of interest, although no part of the principal debt is due, when the road cannot be sold in parts, without injury to the whole;² and it seems that this is the rule as well where the

ings of the road at the time of the filing of a bill to foreclose it, and before possession was taken under the mortgage, must be postponed to the lien acquired by an execution creditor under a bill brought by him to subject such moneys to the payment of his judgment.

¹ *Gibert v. Washington, &c. R. Co.*, 33 Gratt. (Va.) 465; *Peto v. Welland Ry. Co.*, 9 Grant Ch. (U. C.) 455.

² *Wilmer v. Atlanta, &c. R. Co.*, 2 Woods (U. S.), 447; *McFadden v. May's Landing R. Co.*, 49 N. J. Eq. 176; *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 853, 856. Where most of the lien holders urge a sale of the property, and it appears that in spite of the exercise of ability and economy by the receiver for three years the net earnings do not amount to enough to pay the interest on the mortgage bonds, a sale will be ordered, although it is strongly opposed by one class of bondholders. "Where there are two classes of creditors before the court," it was said, "one of which is safe at all events, and the safety of the other is doubtful, the latter class are entitled to the consideration and care of the court." *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 856. See also *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 48 Fed. Rep. 139; *Bound*

v. South Carolina R. Co., 46 Fed. Rep. 315. A mortgage executed by a railway company to secure its bonds provided that, in case of default for six months in the payment of the interest upon either of them, the entire amount of the debt secured "shall forthwith become due and payable," and that the lien of the mortgage might be at once enforced. The bonds themselves declared that "in case of the non-payment of any half-yearly instalment of interest which shall have become due and been demanded, and such default shall have continued six months after demand," the principal of the bond should become due with the effect provided in the mortgage. It was held that, the mortgage being a mere security, the terms of the bonds must control in determining when the principal was payable. *Indiana, &c. R. Co. v. Sprague*, 103 U. S. 756. In a Georgia case, a mortgage of the property of a railroad company to secure the holders of its bonds, and the guarantor of their payment, provided that, upon default in the payment of the interest or principal of any bond when due, the trustees might take possession of the road and work it for the benefit of the bondholders, and that they might, at their option, in the case of default in payment, after sixty days' no-

trustees exercise the power of sale under the mortgage, as where they seek the intervention of a court of equity under foreclosure

tice to the mortgagor, sell its property, having previously advertised said sale for sixty days, the proceeds to be applied to the payment of the bonds. It was held that the trustees, in case of default in payment of the interest, might enter and subsequently sell, after a compliance with the requisite conditions; and that they must advertise the sale for sixty days after the sixty days required for notice had expired. *Macon, &c. R. Co. v. Georgia R. Co.*, 63 Ga. 103. Bondholders claiming the right to avoid a purchase fairly made by the president of an insolvent railroad corporation at the foreclosure sale of its property, or to treat such purchaser as a trustee for them, they having had, at the time of the sale, full knowledge of all the facts, and having then had the opportunity of taking the property off the hands of the purchaser, and having remained quiescent while such purchaser expended money of his own to make the property valuable, and the property having become enhanced in value by subsequent events, such as the general rise of railroad property and the establishment of other roads, are entitled to no relief in a court of equity. *Credit Co. v. Ark. Central R. Co.*, 15 Fed. Rep. 46. In another case before the same court, a railroad bondholder brought a suit in equity against a railroad corporation for an injunction and an accounting. He made the mortgage trustee a co-defendant, on the ground that he had neglected to bring the suit when requested. No service was had on the trustee, nor did he appear. It was held that, without service on, or an appearance by him, the suit could not be maintained. *Morgan v. Kansas Pacific R. Co.*, 15 Fed. Rep. 55. Provisions in a railroad mortgage, that, in case the trustee should sell the mortgaged property upon default of payment, the mortgaged bonds should be received, at a rate to be fixed in a certain manner, as part of the purchase-price, do not bind the court, if foreclosure proceedings are instituted, and a sale is made under its direction. *Farmers' L. & T. Co. v. Green Bay, &c. R. Co.*, 10 Biss. (U. S.) 203. In the mortgage of a railroad, it was cove-

nanted and agreed by all the parties thereto that, in case of a foreclosure sale of the mortgaged property under a decree, the trustee named in the mortgage should, on the written request of the holders of a majority of the then outstanding bonds thereby secured, purchase the property at such sale for the use and benefit of the holders of such bonds, and that the right and title thereto should vest in him, no holder to have any claim to the proceeds except his *pro rata* share thereof, as represented in a new company or corporation to be formed for their use and benefit; and that the trustee might take such lawful measures to organize a new company for their benefit upon such terms, conditions, and limitations as the holders of a majority of the bonds should in writing request or direct, and he should thereupon reconvey the premises so purchased to such new company. On default of payment, a suit was brought by the trustee against the mortgagor and subsequent mortgagees, praying for a foreclosure of the first mortgage and for general relief. It was held: (1) That such an agreement enures equally to the benefit of such bondholders, and that each holds his interest subject to the controlling power given to the majority of them. (2) That the trustee, the *cestui*, and the trust itself, being before the court, and it appearing that the holders of a majority of the bonds had in writing requested, and directed the trustee, if he became the purchaser of the property, to convey it to a new corporation, the court might authorize and direct him to bid at the sale at least the amount of the principal and interest of the first-mortgage bonds, and might provide for a complete execution of the trust. (3) That though the specific relief sought was a strict foreclosure, a decree for a sale of the property, and for the enforcement of the agreement contained in the deed, was, under the prayer for general relief, appropriate. (4) That it was not error for the court to require that if a person other than the trustee became the purchaser at the sale, he should pay at once in cash a part of his bid as earnest money. (5) That where some of the first-mortgage

proceedings.¹ But if the mortgage does not provide that, upon default in the payment of interest, the principal debt shall become due, and the property can without injury be divided, then no more of it should be sold than is necessary to pay the interest matured; and a court of equity will so decree, or in a proper case it will, upon application of the company, direct that the property be leased for such a period as will secure the payment of the sum due and the interest accruing.² In some of the States³ provision is made by statute for such contingencies, but in most of them the matter is left to the provisions of the mortgage and the discretion of the trustees and courts of equity. When a decree is obtained in foreclosure proceedings, the sale should be made by a proper legal officer; but the trustees are invested with the power to determine the question whether they will sell the road and property under the decree, as well as the time of making the sale, and they will not be compelled to make such sale by *mandamus* or other process.⁴

The court may, where the property is insufficient to meet the mortgage indebtedness, under certain circumstances, order it sold by the receiver pending the foreclosure proceedings. Thus the indebtedness of the company, being more than double its assets, there being no income to meet the expense of the necessary repairs, its property

bondholders were permitted to intervene as parties to prosecute, for the protection of their several interests, an appeal from the decree for a sale of the property, and the appeal not having been made a *supersedeas*, the decree was executed, they cannot object to orders made prior to the decree, nor assign for error any part of it which is not injurious to their interests. *Sage v. Central R. Co.*, 99 U. S. 334. A trustee for railroad bondholders was empowered by the mortgage to foreclose upon default, at the request of holders of the bonds to a certain amount, and to bid in the property at the request of a majority of the bondholders, and to take measures to organize a new company, upon the terms directed by such majority, and to convey the property to such company. Foreclosure was properly begun, and before sale A., a bondholder, prayed for a stay. An order was entered, to which A. assented, directing the trustee to bid up to \$450,000, "for the benefit of all the bondholders." The trustee bid in the property for

\$750,000, not being requested so to do by a majority of bondholders. In a suit brought by A. to recover the amount of his bonds, it was held that the trustee had the right, and it was his duty, to make the purchase; and the order having fixed only a minimum bid at which he should allow others to purchase, he had the right to bid more. *James v. Cowing*, 82 N. Y. 449.

¹ *Wilmer v. Atlanta, &c. R. Co.*, 2 Woods (U. S.), 447.

² *Bardstown, &c. R. Co. v. Metcalf*, 4 Met. (Ky.) 199.

³ Indiana, Kansas, Kentucky, and New York, and others.

⁴ *Farmers' L. & T. Co. v. Central R. Co.*, 4 Dill. (U. S.) 533. A bondholder of a railroad, who has approved a plan of reorganization, with full knowledge thereof before and afterwards, has no standing in equity to repudiate the plan, and to have the proceedings under it annulled, no fraud or imposition on him being shown. *Matthews v. Murchison*, 15 Fed. Rep. 691.

being of such a character as materially to deteriorate in value pending a protracted litigation; and it being clearly for the interest of all concerned in the property that it should be sold as early as possible, and almost all the first-mortgage bondholders represented by the trustees asking for the sale,—the road and its franchises were ordered to be sold by the receiver, pending proceedings for foreclosure by trustees for the first-mortgage bondholders, which disputes about the extent and validity of the mortgage lien threatened greatly to delay.¹

Unless the statute so provides, a sale of the property and franchises of a railway company, under a mortgage, does not destroy the corporate existence of the corporation or convey to the purchaser debts due to the company,² or make him liable either upon the contracts or for the torts of the corporation,³ unless this liability is imposed upon the purchaser as a condition precedent to its right to operate the road under a special charter.⁴ The court may, however, and often does, in ordering or confirming the sale, make provision for the payment by the purchaser of debts due by the company, and for the disposition of the company's contracts;⁵ and where a purchaser accepts the property under such a decree of confirmation, he is estopped afterwards to object to any of its provisions.⁶

If upon a sale of the property there is a surplus after satisfying the mortgage, it must be applied in discharging subsequent

¹ *Middleton v. N. J. West Line R. Co.*, 26 N. J. Eq. 269.

² *Wright v. Milwaukee, &c. R. Co.*, 25 Wis. 46.

³ *Secombe v. Milwaukee, &c. R. Co.*, 2 Dill. (U. S.) 469; *Hopkins v. St. Paul, &c. R. Co.*, 2 id. 396; *Metz v. Buffalo, &c. R. Co.*, 58 N. Y. 61; *Wellsborough, &c. Plank R. Co. v. Griffin*, 47 Penn. St. 417. The decree confirming the sale gave the purchaser the right to abandon and disclaim any lease made by the old company. Soon after entering into possession of the road, he gave notice to a lessee of running powers over the road that he disclaimed the lease and forbade the further use of the road by the lessee after thirty days. It was held that his acceptance of the rental for these thirty days did not operate as a waiver of his right to repudiate the lease. *Farmers' L. & T. Co. v. Chicago, &c. R. Co.*, 44 Fed. Rep. 653.

⁴ *St. Louis, &c. R. Co. v. Miller*, 43 Ill. 199.

⁵ In the case of *Olcott v. Headrick*, 141 U. S. 543, the decree of sale provided that all claims, demands, etc., accruing during the receivership should be paid by the purchaser, but that all claims should be barred unless presented within six months after the confirmation of the sale. The decree confirming the sale omitted any provision as to the presentation of such claims, and no objection was made to it by the purchasers on account of such omission. It was held that persons having such claims were entitled to present them after the expiration of the six months; since the proceeds of the sale were substantially a fund in the hands of the court, it was within its discretion to abrogate the six months' limitation.

⁶ *Farmers' L. & T. Co. v. Central R. Co.*, 17 Fed. Rep. 758; *Brown v. Wabash, &c. R. Co.*, 96 Ill. 297.

liens according to the order of their priority, or if there are no such liens, to the corporation;¹ and the stockholders, according to the case last cited, are not entitled to have any part of such surplus distributed to them. Upon the sale of a railroad and its franchises, the purchaser takes the same right to operate the road which the corporation had;² but as the policy of the law requires that these franchises should be exercised by a corporation, it would doubtless be necessary, where the purchase is made by an individual, that a new corporation should be formed, and in many of the States provision is made by statute for this emergency. The Texas court holds, however, that as the purchasers succeeded to all the rights, powers, privileges, and functions of the corporation, they may continue business, if they choose to do so, under its name, without notice even, and in its dealings with strangers it is under no obligations to show by what authority it claims succession.³ The purchaser does not continue the old corporation, and in the absence of any statutory provision relative thereto, the purchase does not invest him with corporate capacity, or pass to him the franchise to be a corporation.⁴ But in such cases a new corporation may be formed where general statutes exist authorizing their formation, or in the absence of such statutes a special charter for that purpose must be obtained. As has been before stated, the new corporation does not become liable for the debts, acts, or defaults of the old corporation, even though the mortgage or the statute provides that the stockholders of the old corporation may, upon certain conditions, become stockholders in the new one.⁵ But it may become so by a special agree-

¹ *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392.

² The sale under foreclosure does not operate as an abandonment of the rights acquired by the old company in land embraced within its right of way, and the purchaser succeeds to all such rights. *Harshbarger v. Midland R. Co.*, 131 Ind. 180; 27 N. E. Rep. 352.

³ *Acres v. Mayne*, 59 Tex. 623.

⁴ *Atkinson v. Marietta, &c. R. Co.*, 15 Ohio St. 21; *Dow v. Beidelman*, 49 Ark. 325, 455; *Bruffett v. Gt. Western R. Co.*, 25 Ill. 358. But it passes to him the franchise of eminent domain. *Lawrence v. Morgan's Steamship Co.*, 39 La. An. 427.

⁵ *Sullivan v. Portland, &c. R. Co.*, 94 U. S. 806; *Dexter v. Ross*, 85 Mich. 370; *Smith v. Chicago, &c. R. Co.*, 18 Wis. 17;

Cushman v. Bonfield, 36 Ill. App. 436. See also *Carey v. Honston, &c. R. Co.*, 45 Fed. Rep. 438. In *Moyer v. Ft. Wayne, &c. R. Co.*, 132 Ind. 88; 31 N. E. Rep. 567, it appeared that M. agreed to erect a station for two railway companies, each of which was to pay a part of the cost, he himself agreeing to pay a third part. He built the station as agreed, but one of the companies failed to pay its part. The road of this company was soon after sold under a mortgage, and purchased by two bondholders who organized a new company to operate it. The new company used the station, and M. thereupon brought his action to recover the amount due by the old company. It was held, on the principle of the text, that his action could not be maintained.

ment on its part to assume such liabilities,¹ and it does become liable for a failure to discharge the public duties incumbent upon the old company, including the repair of bridges forming part of the highway over its road.² So also the decree confirming the sale may impose upon it liability for certain claims against the old company.³ The duties and liabilities of the purchaser are often fixed by the decree confirming the sale.⁴ The stockholders of the old corporation may become stockholders in the new one, either by the provisions of the statute, the mortgage, or by the agreement of the purchasers. But where this right is subject to a condition, the condition must

¹ *Rutten v. Union Pacific R. Co.*, 17 Fed. Rep. 480. Following the decisions of the Supreme Court of Vermont, it was held by the United States Circuit Court that the mortgage executed by the Vermont & Canada R. Co. to secure the payment of the bonds issued by this road, and the Vermont Central, under the name of the Consolidated R. Co. of Vermont, was a mortgage of a rent charge, the V. & C. having the right to a fixed annual rent from the Central; that the V. & C., as it had the right to deal with the rent, could change the security by the issue of bonds; and that, there being apparently nothing in the transaction injurious to the interests of stockholders, the delivery of the bonds to them would not be restrained. *Hazard v. Vt. & Canada R. Co.*, 17 Fed. Rep. 753. In a Massachusetts case, the Boston, Hartford, & Erie R. Co. executed a mortgage to secure its bonds for \$1,000 each, with interest. The mortgage provided for foreclosure, and for the organization, after foreclosure, of a new corporation with a capital stock equal to the outstanding mortgage debt, the corporators to be the holders of the mortgage bonds, and to receive the stock of the new corporation in exchange for the surrender of their bonds at the rate of ten shares for each bond. Before foreclosure the Erie R. Co., for the purpose of developing business, guaranteed the payment of the interest upon a portion of these bonds, and also purchased some of the bonds at a discount, and resold them with its guaranty of interest indorsed upon them. In consideration of the guaranty, the B., H., & E. Co. agreed with the E. Co. that payments of interest thus made should constitute a lien on the property

covered by the mortgage. It was held that the holders of these interest warrants were not entitled to demand stock of the new company in exchange for them. *Child v. New York, &c. R. Co.*, 129 Mass. 170. See *Dexter v. Ross*, 85 Mich. 370, in which a reorganization was allowed after a confirmation of the receiver's sale. The purchaser at the foreclosure sale may be a foreign corporation, *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393.

² *New York, &c. R. Co. v. State*, 53 N. J. L. 244.

³ In *Campbell v. Pittsburgh, &c. R. Co.*, 137 Penn. St. 574; 27 W. N. Cas. 79, the decree provided that the purchaser should take "subject to all unpaid purchase money for any of the lands or right of way herein referred to, as well as to all unpaid claims of land-owners for damages for property taken or injured in the construction of the road." It was held that this did not render the purchaser liable on a judgment rendered against the old company, prior to the sale for a trespass upon plaintiff's land and constructing the road there without leave. Where the receiver, by a change in the line of the road created a nuisance, which the purchaser after notice (to his engineer) allows to continue, the purchaser must respond in damages for the injury caused thereby to the owner of adjacent land. *George v. Wabash, &c. R. Co.*, 40 Mo. App. 433. The purchaser is bound to operate the road through a town which had aided in the construction of the road, and cannot escape this duty by leasing that part of the line. *State v. Central Iowa R. Co.*, 71 Iowa, 410.

⁴ See *Central Trust Co. v. Wabash, &c. R. Co.*, 30 Fed. Rep. 332.

be strictly complied with by the stockholder. Thus, in an action by the plaintiff against the W. railway company and a certain committee, to recover damages at law, the complaint alleged, in substance that at a foreclosure sale of the railroad and franchises of the T. railroad company a committee of the holders of the bonds secured by the mortgage became the purchaser; that certain stockholders, who had questioned the validity of the sale, were accorded by the purchasers the right to take stock in the new company to be organized, on condition that the option so to do be made within thirty days; that the W. company was accordingly organized, issued stock, and was operating the road; that T. had no notice nor knowledge of the agreement until after thirty days had expired; that, when notified, he tendered performance, and demanded his share of the new stock, which was refused. It was held that the complaint did not set forth a cause of action. If the foreclosure sale was valid, all T.'s legal rights were cut off; if invalid, his right to attack it was not affected by the agreement, unless he elected to ratify it, in which case he could not vary its terms.¹ But where the statute or contract provides that thirty days' notice shall be given of the assessment, a stockholder does not lose his right by a failure to pay within the time, where he had no notice of the assessment, and notice thereof was only given by publication, which was not brought home to him.²

¹ Thornton v. Wabash, &c. R. Co., 81 N. Y. 462.

² Vatable v. New York, &c. R. Co., 11 Abb. (N. Y.) N. C. 133. In this case a judgment, foreclosing a mortgage given to secure railroad bonds, provided for a reorganization, under which stockholders were entitled to exchange their stock for stock of the new company, upon making a specified payment. The power to fix the time within which such exchange might be made was conferred upon the parties to the "plan and arrangement." No time, however, was fixed. It was held that a stockholder was entitled to an exchange without regard to the date of his offer. In a New Jersey case, after the appointment of a receiver of an insolvent corporation, and proceedings in foreclosure, an agreement was entered into among the secured and general creditors of the corporation, whereby certain income bonds were to be

issued, "payable in thirty years, with interest at seven per cent, payable half-yearly," and the interest was to be paid if the company should "be able to pay it by its income, after paying claims prior thereto, within the year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed. It was held that the committee had authority to consent that the bonds should be made payable at the option of the company, on or before the expiration of thirty years from the date of their issue; also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid. Lehigh Coal & Nav. Co. v. Central R. Co., 34 N. J. Eq. 88. In a Texas case, the purchasers of a railroad at an execution sale issued a circular letter offering the old stockholders the privilege of participating in the

SEC. 476 *a*. **Reorganization.** — In the absence of any statute to the contrary, the foreclosure of a railroad mortgage cuts off all the rights and interests of the mortgagor, the railroad corporation, in the mortgaged property, and nothing is left for the general creditors and stockholders save the interests in the surplus after satisfying the mortgage. Therefore where the property and franchises of a railroad corporation are purchased on foreclosure sale in pursuance of a plan for the readjustment of the respective interests of the mortgage creditors and stockholders, as authorized and provided for by the statute designed to facilitate the reorganization of railroads sold under mortgage, the foreclosure becomes absolute against the corporation, and all its rights and the proprietary interests of the stockholders are as absolutely barred and cut off as if the purchasers had purchased for themselves.¹ Under such a statute in New York, a stockholder in the old company can only become a stockholder in the new by complying with the terms of the plan of reorganization, and where notice is published to the effect that certain payments must be made by stockholders wishing to join the new corporation, if they fail to make such payments, within the time limited, they cannot afterwards claim the right to come in on the ground that they had no notice.² A plan for the reorganization of an insolvent railroad company which, among other things, provides that the holders of the unsecured indebtedness shall receive second preferred income bonds of the new company at par to the full amount of their respective debts and interest, and also provides that the stockholders of the old company shall receive stock of

purchase on payment, within a fixed time, of ten per cent on their full-paid stock, and a statute subsequently passed released the road from forfeiture on condition that the original stockholders were restored to all their rights to which they were entitled prior to the sale, provided they paid ten per cent upon their stock before a certain time; and later, by a resolution of the company, the original certificates of stock were replaced by new certificates on the basis of eight new for one old certificate. It was held that an original stockholder who paid the ten per cent on the amount of his stock after the time had expired, could not compel the company to issue stock to him for the amount paid by him, there being no statute authorizing the issue of such stock. *Vanalstyne v. Houston, &c. R. Co.*, 56 Tex. 377.

¹ *Vatable v. New York, &c. R. Co.*, 96 N. Y. 49.

² *Vatable v. New York, &c. R. Co.*, 96 N. Y. 49. On the sale of the mortgaged property it was bought in by the trustee under a provision in the sale allowing such a purchase, and providing that on the payment by any bondholder of his proportionate share of the moneys paid by the trustee for the expenses of the action, the purchase should enure to the benefit of any such bondholder. It was held that the payment of his proportionate share of the said expenses was a condition precedent to his right to an accounting from the trustee; and that the offer to pay came too late when made fourteen years after the purchase. *Zebbley v. Farmers' L. & T. Co.*, 63 Hun (N. Y.), 541.

the new company in exchange at a certain ratio, is not fraudulent and void as to the holders of the unsecured indebtedness. The fact that if a holder of unsecured indebtedness avails himself of the reorganization, he must contribute ratably to the necessary expenses, does not render such reorganization void.¹

SEC. 477. Redemption. — When a railway and its franchises have been sold under valid foreclosure proceedings, and the sale has been confirmed, the corporation has no right to redeem the same.² The only remedy, if any, is by proceedings to set aside the sale, and it has been held that the corporation may institute such proceedings even though it has assigned its equity of redemption for the benefit of its creditors.³ But while the trustees are in possession of the road, managing it for the bondholders, a bill to redeem may be brought;⁴ so, too, redemption may be made at any time before the sale has been confirmed.⁵ But in several of the States statutes exist relative to this matter, and in such cases the question as to whether a right of redemption exists is readily ascertained.

SEC. 477 a. Intervention by the State. — The settled rule is that the State can intervene in foreclosure proceedings only when it is entitled as a bond or lien holder to share in the proceeds of the sale, or when public interests are at stake which are seriously threatened by the proposed disposition of the railroad property.⁶ Where a creditor is seeking judgment against a railroad company on certain bonds and mortgages held by him, an intervening petition by the State alleging that the bonds and mortgages are void and that the company, by collusion and neglect to defend, is about to allow judgment to go against it by default, that the company in consideration of large grants of land from the State has agreed to maintain

¹ *Hancock v. Toledo, &c. R. Co.*, 11 Biss. (U. S.) 148.

² *Turner v. Indianapolis, &c. R. Co.*, 8 Biss. (U. S.) 380. Complainants having executed certain bonds, payable in thirty years, made a traffic contract with another railroad company by which it was agreed that the latter should retain complainant's share of the earnings, and pay them over semi-annually to a trustee to be applied to the ultimate redemption of the bonds, the contract to continue for thirty years, "or for so long a time as will be sufficient to provide a fund large enough to redeem all of said bonds." This agreement was indorsed on the bonds. It was held that it

did not give the complainant the right to pay off the bonds as soon as a fund sufficient for that purpose had accumulated and before the expiration of the thirty years. *Chicago, &c. R. Co. v. Pyne*, 30 Fed. Rep. 86.

³ *Delaware, &c. R. Co. v. Scranton*, 34 N. J. Eq. 429.

⁴ *Ashuelot R. Co. v. Elliott*, 57 N. H. 397.

⁵ *Howell v. Western R. Co.*, 94 U. S. 436; *Chicago, &c. R. Co. v. Fosdick*, 106 U. S. 47.

⁶ *State v. Farmers' L. & T. Co.*, 81 Tex. 530, 553; 17 S. W. Rep. 60, 67; *Herring v. New York, &c. R. Co.*, 105 N. Y. 340.

low rates of transportation, and that if said bonds and mortgages are foreclosed, the rates will, of necessity, be increased, and thus impose burdens upon commerce, does not show such a public interest as entitles the State to intervene and prevent such judgment, particularly where neither the charter of the road nor subsequent legislation show any such contract as that alleged, and the charter expressly provides that its rates of traffic shall be governed by State regulation.¹

¹ *State v. Farmers' L. & T. Co.*, 81 Tex. 530, 553; 17 S. W. Rep. 60, 67. Unsecured creditors of a railroad corporation are not necessary or proper parties to, and have no right to intervene in, an action to foreclose a mortgage upon its property and franchises; any adjudication made therein against the mortgagor is binding upon them. And where, at the time of the commencement of such an action, an action was pending, brought by the attorney-general on behalf of the people to dissolve

the corporation on the ground of insolvency, in which action a temporary receiver has been appointed, held, that such receiver was not a necessary party to the foreclosure suit. *Herring v. New York, &c. R. Co.*, 105 N. Y. 340. See also as to the right of third parties to intervene. *Central Trust Co. v. Marietta, &c. R. Co.*, 48 Fed. Rep. 14; *Fitzgerald v. Evans*, 49 Fed. Rep. 426; 4 U. S. App. 154; *Kneeland v. Luce*, 141 U. S. 437.

CHAPTER XXX.

RECEIVERS.

SEC. 478.	Power to Appoint.	SEC. 483.	Judgments against a Receiver: Right to pay Claims, etc.
478 a.	When Receivers will be appointed.	483 a.	Receiver's Certificates.
479.	Appointment on Application of Mortgage Creditors.	484.	Removal or Discharge.
480.	Who will be appointed.	485.	Accounting and Compensation.
481.	The Status of a Receiver.		
482.	Liability of Receiver as Common Carrier, for Negligence, etc.		

SEC. 478. Power to appoint. — The power to appoint a receiver has always been considered as one of the inherent powers of a court of equity, and has been exercised from the earliest times.¹ A receiver was originally appointed, however, only with a view to winding up the business of the partnership or association; it was never contemplated that he should take charge of the business, and continue to conduct it. Indeed under the English law a receiver has not yet any such powers, but they can only be conferred upon a manager.² The English courts, therefore, held that a court of equity had no inherent power to appoint a manager to take charge of the property of a railway company and operate the road.³ The matter is now

¹ *Williamson v. Wilson*, 1 Bland (Md.), 420; *Hopkins v. Worcester, &c. Canal Co.*, L. R. 6 Eq. 447; *Folsom v. Evans*, 5 Minn. 418; *Skinner v. Maxwell*, 66 N. C. 45, 255; *Bispham's Prin. of Eq.* (4th ed.) §§ 576, 578.

² See *in re Manchester, &c. Ry. Co.*, 14 Ch. Div. 653, where the court draws the distinction between a receiver and a manager, observing that a receiver had no authority except to wind up the business, that if a continuation of the business was contemplated, a manager was necessary. But this distinction does not prevail in this country; the office of manager is embraced within that of receiver. *Foster's Fed. Prac.* § 239. See also *Rice v. St.*

Paul, &c. R. Co., 24 Minn. 464 (receiver defined); 20 Am. & Eng. Ency. Law, pp. 11, 330.

³ *Gardner v. London, &c. R. Co.*, L. R. 2 Ch. App. Cas. 212. The court argued that the unusual and extraordinary powers and responsibilities imposed by Parliament upon the company could not be delegated or transferred. "It is impossible to suppose," Lord CAIRNES went on to say, "that the court of chancery can make itself or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real correlative responsibility for the consequences of any imperfect management."

governed by the Railway Companies' Act which provides for the appointment of a receiver and manager in a proper case.¹

In this country the State courts, having the same equity jurisdiction as that possessed by the chancery courts of England, have assumed a more extended authority, and it has been usual to appoint receivers to operate railroads without any special grant of authority by statute.² The Federal courts possess no powers except those conferred by statute; the jurisdiction as conferred by Act of Congress is co-extensive with that of the High Court of Chancery in England, and is exercised in accordance with the equitable principles developed there. But it has generally been considered to be within the jurisdiction of these courts to take charge of railroads by appointing a receiver, and the authority has been long exercised without objection.³ Although doubt has been sometimes expressed as to the propriety of this jurisdiction, and courts are always opposed to its exercise, except in cases of extremity, its existence does not now admit of question.

SEC. 478 a. When Receivers will be appointed.—The propriety of the appointment of a receiver rests in the sound discretion of the court, the exercise of which will never be interfered with except in very plain cases of error.⁴ But except where, as is the case in some of the States, the statute makes provision for the appointment of a receiver over a corporation in certain cases, courts of equity are ex-

¹ See the act considered at length in *re Manchester, &c. Ry. Co.*, 14 Ch. Div. 645; *Latimer v. Aylesbury, &c. Ry. Co.*, 9 Ch. Div. 385. Also in 20 Am. & Eng. Ency. Law, pp. 335-337.

² *U. S. Trust Co. v. New York, &c. R. Co.*, 101 N. Y. 478; 25 Am. & Eng. R. Cas. 601; *Meyer v. Johnston*, 53 Ala. 237; *Brown v. New York, &c. R. Co.*, 19 How. Pr. (N. Y.) 84; *Hollenbeck v. Donnell*, 94 N. Y. 342; *Vermont, &c. R. Co. v. Vt. Central R. Co.*, 46 Vt. 792. Compare *Pond v. Framingham, &c. R. Co.*, 130 Mass. 194; 9 Am. & Eng. R. Cas. 551.

In a number of the States statutes exist which specifically confer upon equity courts authority to appoint receivers. See *Delaware Bay, &c. R. Co. v. Markley*, 45 N. J. Eq. 139; 37 Am. & Eng. R. Cas. 421. But these statutes, it has been observed, "do not materially alter the equitable jurisdiction of the courts;" they merely confirm already existing authority.

Skinner v. Maxwell, 66 N. C. 45, 125. See also *Landrum v. Chamberlain*, 73 Ga. 727; *Kerr v. White*, 7 Baxt. (Tenn.) 394; *Allen v. Harris*, 4 Lea (Tenn.), 190; *East Line, &c. R. Co. v. State*, 75 Tex. 434; 40 Am. & Eng. R. Cas. 574; *ex parte Dunn*, 8 S. C. 207.

³ *Davis v. Gray*, 16 Wall. (U. S.) 203; *Kennedy v. St. Paul, &c. R. Co.*, 2 Dill. (U. S.) 448; *Overton v. Memphis, &c. R. Co.*, 10 Fed. Rep. 866; 3 McCrary (U. S.), 436. See also *Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 563; *Robinson v. Campbell*, 3 Wheat. (U. S.) 280; *Fletcher v. Morey*, 2 Story (U. S.), 567; *Beach on Receivers*, § 10.

⁴ *Farmers' L. & T. Co. v. Chicago, &c. R. Co.*, 27 Fed. Rep. 146; 24 Am. & Eng. R. Cas. 166; *Smith v. Port Dover, &c. R. Co.*, 12 Ont. App. 288; 25 Am. & Eng. R. Cas. 639; *American L. & T. Co. v. Toledo, &c. R. Co.*, 29 Fed. Rep. 421.

tremely cautious about taking charge of its business by this summary proceeding upon the application either of shareholders or creditors.¹ Upon the appointment of a receiver, the functions, powers, and liabilities of the corporation are suspended, and from that time it ceases to be liable for any contracts made, or acts done, in the operation of the road by the receiver,² unless the statute otherwise provides,³ or the possession of the receiver and the corporation or its lessee is joint.⁴ These being among the consequences incident to the appointment of a receiver, and of such nature that they directly affect the interests of the public as well as of the corporation, the courts will not interpose this remedy, except where the facts are such as to demand it, and the emergency is great.⁵

In the case of railway companies, they being corporations of a *quasi* public character, and the interests of the public being directly affected by any interference with them, courts of equity will not generally put them in the hands of a receiver, except where they are insolvent, and it becomes necessary to wind them up for the benefit of its mortgage or general creditors, or where the company being able to pay its debts from its net earnings by an economical management of its business, neglects or refuses to use the surplus for that purpose.⁶ It would be impossible to lay down any general rules by which to determine when a receiver will be appointed, but it must be borne in mind that the emergency must be great (independently of any statutory provision) that will justify the appointment even upon notice,⁷ and it must be *very great* to warrant an appointment

¹ Neall v. Hill, 16 Cal. 145; Belmont v. Erie R. Co., 52 Barb. 637; Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Stevens v. Davison, 18 Gratt. (Va.) 819; Meyer v. Johnston, 53 Ala. 237; Kelly v. Alabama, &c. R. Co., 58 Ala. 589. See also Langdon v. Vermont, &c. R. Co., 54 Vt. 593; 11 Am. & Eng. R. Cas. 688.

² Bell v. Indianapolis, &c. R. Co., 53 Ind. 57; Ohio, &c. R. Co. v. Davis, 23 Ind. 553; Waterbury v. Merchants' Union Express Co., 50 Barb. (N. Y.) 157; Hanes v. Duell, 43 Barb. 504; Bangs v. McIntosh, 23 Barb. 591.

³ Louisville, &c. R. Co. v. Cauble, 46 Ind. 277.

⁴ Railroad Co. v. Brown, 17 Wall. (U. S.) 445.

⁵ State v. Jacksonville, &c. R. Co., 15 Fla. 20; Stevens v. Davison, 18 Gratt.

(Va.) 819; Overton v. Memphis, &c. R. Co., 10 Fed. Rep. 866; Railway Co. v. Jewett, 37 Ohio St. 649; Bill v. New Albany, &c. R. Co., 2 Biss. (U. S.) 390; Vermont, &c. R. Co. v. Vt. Central R. Co., 50 Vt. 500. "The modern practice, prevailing to some extent elsewhere, of transferring corporate property to the custody of the courts, to be thus held and managed for an indefinite period of years, to suit the general convenience of parties, whereby general creditors and stockholders are kept at bay, I regard as a mischievous innovation." Taylor v. Philadelphia, &c. R. Co., 9 Fed. Rep. 1; 3 Am. & Eng. R. Cas. 179.

⁶ Stevens v. Davison, 18 Gratt. (Va.) 819; Covington Drawbridge Co. v. Shepherd, 21 How. (U. S.) 112; Milwaukee, &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510. ⁷ Pullan v. Cincinnati, &c. R. Co., 4

ex parte.¹ All the circumstances are to be taken into consideration; and where one part of the trust involves duties of a public character, the court will be very reluctant to take the fund out of the hands of trustees, and will not do so except for the most cogent reasons, — such as gross fraud and imminent danger that the trust fund will be lost; and generally, if there are any coercive measures by which the trustees can be compelled to perform their duties, they will be resorted to before the extreme measure of appointing a receiver is adopted.² Where the relief sought is founded upon a disputed equity, a court of equity will, with great reluctance and hesitation, take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railway company who would be affected similarly with the plaintiff were before the court, the court ought to hesitate before appointing a receiver on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock.³ The mere fact that there has been a default in the payment of interest upon its bonds

Biss. (U. S.) 35; Vermont, &c. R. Co. v. Vt. Central R. Co., 50 Vt. 500. In order to induce a court of equity to exercise this power and assume control of the property, the interests of the creditors must unmistakably require it; and where a railway company fraudulently and collusively permits its property to go into the hands of a receiver, for the purpose of keeping its property out of the hands of its creditors, the court will of its own motion discharge the receivers. *Sage v. Memphis, &c. R. Co.*, 18 Fed. Rep. 571; *Pond v. Framingham, &c. R. Co.*, 132 Mass. 194. Mere insolvency is not enough. *Meyer v. Johnston*, 53 Ala. 237. Nor is the mere circumstance that a judgment has been obtained and an execution thereon returned unsatisfied. *Church v. South Side R. Co.*, 1 Hun (N. Y.), 636. A receiver of an extinct corporation cannot be appointed when its powers and property have been transferred to a new corporation substituted for it. *Young v. Rollins*, 85 N. C. 485. The court will never appoint a receiver on slight grounds merely because the appointment would do no harm. *Simpson v. Ottawa, &c. Ry. Co.*, 1 Ch. Chamb. Rep. 126; *Smith v. Port Dover, &c. Ry. Co.*, 12 Ont. App. 288; 25 Am. & Eng. R.

Cas. 639; *Orphan Asylum v. McCartee*, 1 Hopk. Ch. (N. Y.) 429.

¹ *State v. Jacksonville, &c. R. Co.*, 15 Fla. 201; *Railway Co. v. Jewett*, 37 Ohio St. 649; *Cincinnati, &c. R. Co. v. Sloan*, 31 Ohio St. 1; *Turgeon v. Brady*, 24 La. An. 348. A receiver will never be appointed without notice to all parties interested, unless the delay required for such notice would cause irreparable loss. *Railroad Co. v. Jewett*, 37 Ohio St. 649; 8 Am. & Eng. R. Cas. 702; *Cook v. Detroit, &c. R. Co.*, 45 Mich. 453; 12 Am. & Eng. R. Cas. 459; *Bisson v. Curry*, 35 Iowa, 72; *Young v. Rollins*, 85 N. C. 485; 12 Am. & Eng. R. Cas. 455. Except where insolvency is alleged, such appointments are held to be absolutely void. In *Illinois (Hammock v. Loan & Trust Co., 105 U. S. 77)*, such an appointment cannot be made by a judge in vacation. In *Michigan*, it is held that a court of equity cannot take from the directors of the company the management and control of the corporate business except in proceedings under the statute. *Cook v. Detroit, &c. R. Co.*, 45 Mich. 453; *People ex rel. v. Judge of St. Clair County*, 31 Mich. 456.

² *Vose v. Reed*, 1 Woods (U. S.), 647.

³ *Overton v. Memphis, &c. R. Co.*, 10 Fed. Rep. 866; 3 McCrary (U. S.), 436.

secured by mortgage, and that in consequence the trustees are entitled to possession, and have demanded possession, which has been refused, has been held not sufficient to warrant the appointment of a receiver. In order to justify such an exercise of power, it must also be shown that ultimate loss will result to the bondholders under the mortgage, if the property is permitted to remain in the hands of the company.¹ If the application is made by general creditors of the company, it must also appear that the interests of the creditors unmistakably require that a receiver should be appointed.² Nor will it appoint a receiver if it perceives that a much greater injury would result to those interested in the road than by leaving the property in the hands then holding it, especially when it appears that the large majority of the stockholders and bondholders favor a funding plan then being negotiated.³ During an action to prevent an illegal consolidation of two railroad companies, the stockholders, contrary to an injunction, elected directors of the new company. It was held that this did not constitute a good ground for appointing a receiver for either of the companies; and that the appointment of a receiver cannot be lawfully made without notice, unless the delay required to give notice will result in irreparable loss.⁴ In some instances, where land damages have not been paid, and possession of the land has been obtained with the knowledge of the owner, so that he cannot maintain

¹ Union Trust Co. St. Louis, &c. R. Co., 4 Dill. (U. S.) 114; *Cheever v. Rutland, &c. R. Co.*, 39 Vt. 653.

² *Sage v. Memphis, &c. R. Co.*, 18 Fed. Rep. 571. See *High on Receivers* (3d ed.), § 376. A bill in equity by creditors alleged that the corporation was insolvent; that all its property was mortgaged to trustees for the benefit of one class of creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to the attaching creditor for a long term of years, at a rental which would not pay the interest upon its indebtedness; and that the execution of the lease would be injurious to the interest of its creditors and stockholders. The bill prayed for an injunction to restrain the company from the further prosecution of its business, and for the appointment of a receiver. The court, in dismissing the bill, said: "There is no statute giving this

court equity jurisdiction in such a case as this, and the bill does not state a case within the general equity powers of a court of chancery. As is stated in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 'it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief.'" *Pond v. Framingham R. Co.*, 130 Mass. 194; 9 Am. & Eng. R. Cas. 551. See also *Gardner v. London, &c. Ry. Co.*, L. R. 2 Ch. 212. But this case does not state the general doctrine.

³ *Tysen v. Wabash R. Co.*, 8 Biss. (U. S.) 247.

⁴ *Railroad Co. v. Jewett*, 37 Ohio St. 649; 8 Am. & Eng. R. Cas. 702.

ejectment, a receiver will be appointed and the damages paid from the earning of the road.¹ So where a railway company fails or refuses to complete its road, a receiver of all its property, franchises, etc., will sometimes be appointed to complete the road.² Where the statute makes provision for the appointment of receivers of a railroad company in certain cases, of course no difficulty can arise in determining when such appointments should be made.

SEC. 479. Appointment of Receiver on Application of Mortgage Creditors.—In order to warrant the appointment of a receiver upon the application of bondholders secured by a mortgage upon a railroad and its franchises, as we have already stated,³ something more than a mere default in the payment of interest upon the bonds must be shown. It should also be made to appear that the property is insufficient to pay the debt, and that the bondholders are in danger of sustaining irreparable loss;⁴ or that the default in the payment of interest has been long continued;⁵ or that the company is insolvent,⁶

¹ *Provalt v. Chicago, &c. R. Co.*, 57 Mo. 256.

² *Kennedy v. St. Paul, &c. R. Co.*, 2 Dill. (U. S.) 448.

³ *Ante*, § 478. But where the interest has been long unpaid, and it is apparent that the mortgaged property will not bring sufficient to satisfy the indebtedness, a receiver may be had. *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35. See *Farmers' & M. Bank v. Philadelphia R. Co.*, 14 Phila. (Penn.) 456; *Taylor v. Philadelphia, &c. R. Co.*, 14 Penn. St. 451, where receiver was appointed on petition of first-mortgage bondholders.

⁴ *Fisher v. Timans*, 12 Fla. 300; *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35; *Cincinnati, &c. R. Co. v. Sloan*, 31 Ohio St. 1; *Milwaukee, &c. R. Co. v. Soutter*, 2 Wall. (U. S.) 510. Mr. High states the rule that "in actions for the foreclosure of railway mortgages, given to secure bonds issued by railway companies for purposes of construction and equipment, the courts, upon an application for a receiver in behalf of the mortgagees, proceed upon the usual principles governing applications for receivers in aid of the foreclosure of mortgages; and in conformity with such principles, inadequacy of the mortgage security, coupled with the insolvency of the mortgagor, may be regarded as sufficient grounds for the relief." High

on Receivers (3d ed.), § 376; *Cheever v. Rutland, &c. R. Co.*, 39 Vt. 653; *Dow v. Memphis, &c. R. Co.*, 20 Fed. Rep. 260; 17 Am. & Eng. R. Cas. 324; *Ruggles v. Southern Minn. R. Co.*, 5 Chicago Legal News, 110. See *Mercantile Trust Co. v. Missouri, &c. R. Co.*, 36 Fed. Rep. 221; 36 Am. & Eng. R. Cas. 259; *Allen v. Dallas, &c. R. Co.*, 3 Woods (U. S.), 316; *Kelly v. Alabama, &c. R. Co.*, 58 Ala. 489; *Sage v. Memphis, &c. R. Co.*, 125 U. S. 361; 35 Am. & Eng. R. Cas. 40. In this last case the court granted the application of a judgment creditor for the appointment of a receiver, upon a bill showing in substance that the property of the company was so heavily mortgaged that if he should attempt to enforce the payment of his debt by an execution sale, there would be no bidders at more than a nominal sum, while if the property were placed in the hands of a receiver there would probably be a considerable surplus each year for the payment of the debt. See also *American L. & T. Co. v. Toledo, &c. R. Co.*, 29 Fed. Rep. 418.

⁵ *Williamson v. New Albany R. Co.*, 1 Biss. (U. S.) 198; *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35.

⁶ Insolvency is ordinarily sufficient ground for the appointment of a receiver. *Brassey v. New York, &c. R. Co.*, 19 Fed. Rep. 663; 17 Am. & Eng. R. Cas. 285;

and its property in danger of seizure upon execution; or that the officers of the company have been guilty of gross fraud in the conduct of the affairs of the company, and have squandered or embezzled its funds;¹ or have illegally or fraudulently executed a mortgage upon the property to secure its stockholders, the company being insolvent;² or have been guilty of an abuse of the franchises of the company;³ or are misapplying the funds of the company. Where it is shown that the trustees under a mortgage have, for a considerable period after default, neglected or refused upon request of the bondholders to enter into possession of the road under the mortgage, as they have a right to do under the terms of the mortgage, the court will, in a proper case, upon application of the bondholders, appoint a receiver to execute the trust according to its terms,⁴ unless the trustees signify their willingness to act.⁵ So, too, where there has been default in the payment of interest, and the mortgage does not make any provision for the trustees' taking possession for such default, the court will, especially when the default is unreasonable, appoint a receiver for the purpose of securing the profits of the company to meet such unpaid interest.⁶ The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver, where it appears that

Gest v. New Orleans, R. Co., 30 La. An. 28; *Sewell v. Cape May, &c. R. Co.* (N. J.), 9 Atl. Rep. 785; 30 Am. & Eng. R. Cas. 155. See also *Texas, &c. R. Co. v. Gentry*, 69 Tex. 625; 33 Am. & Eng. R. Cas. 346. Compare, however, *Pond v. Framingham, &c. R. Co.*, 130 Mass. 194; *Farmers' L. & T. Co. v. Chicago, &c. R. Co.*, 27 Fed. Rep. 146; 24 Am. & Eng. R. Cas. 639. A court of equity may appoint receivers for an insolvent railroad company, on application of the company itself, on a petition showing that its property is likely to be seized by different courts, its assets dissipated, and the system disrupted; but it cannot displace vested liens, and must require that the property shall be held and preserved by the receivers for the benefit of all concerned therein as their interests may appear. *Quincy, &c. R. Co. v. Humphreys*, 145 U. S. 82, *affirming* 34 Fed. Rep. 259. See also *Wabash, &c. R. Co. v. Central Trust Co.*, 22 Fed. Rep. 272. But a very plain case would be required before such a petition could be granted. Mere allegations in the bill that the company is

insolvent, and has suspended its business because of lack of funds with which to carry it on, are not sufficient to have the corporation declared insolvent, and a receiver appointed. The facts and circumstances must be set out from which the insolvency will appear. *Newfoundland Ry. Const. Co. v. Shack*, 40 N. J. Eq. 222.

¹ *Forbes v. Memphis, &c. R. Co.*, 2 Woods (U. S.), 323. As where they make a lease of the property without authority of law, and without the consent of stockholders. *Stevens v. Davison*, 18 Gratt. (Va.) 819. See also *Fisher v. Concord R. Co.*, 50 N. H. 200.

² *Aveney v. Bles Mfg. Co.*, 27 N. J. Eq. 412.

³ *Rochester v. Bronson*, 41 How. Pr. (N. Y.) 78.

⁴ *Wilmer v. Atlanta, &c. R. Co.*, 2 Woods (U. S.), 409; *Shaw v. Norfolk, &c. R. Co.*, 5 Gray (Mass.), 162; *Rice v. St. Paul, &c. R. Co.*, 24 Minn. 464.

⁵ *Jenkins v. Jenkins*, 1 Paige Ch. (N. Y.) 243.

⁶ *Jones on Railroad Securities*, § 468.

such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration.¹ The appointment is generally within the sound discretion of the court; but it is a power only to be exercised in strong cases. In no case of a mortgage ought a receiver to be appointed, if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest, and cost.² Nor will the appointment be granted where it appears that the party seeking it has an adequate remedy at law, — this on the ground that the equitable remedy by the appointment of a receiver is an extraordinary one, and like the remedy by injunction will never be exercised where the remedy at law is adequate.³ A receiver may be appointed in an action to foreclose a mortgage, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed.⁴ Where two receivers, acting jointly, representing different interests, disagree, and disputes and dissensions follow, they will both be removed and a single disinterested receiver appointed.⁵

SEC. 480. Who will be appointed. — As a general rule, a party to the cause will not be appointed as receiver,⁶ and unless the parties agree upon a person to serve as such, the court should appoint some person who, by reason of his responsibility and business capacity and training, is fully competent to have the management of the road. It would be exceedingly unjust and improper to appoint a person as

¹ *Tysen v. Wabash R. Co.*, 8 Biss. (U. S.) 247. See, also, *Newport, &c. Bridge Co. v. Douglass*, 12 Bush (Ky.), 673.

² *Pullan v. Cincinnati, &c. R. Co.*, 4 Biss. (U. S.) 35; *Rice v. St. Paul, &c. R. Co.*, 24 Minn. 464.

³ Thus, where a railroad company has sub-let a leased line contrary to a covenant in the lease, a receiver will not be appointed in a suit in equity brought by the lessor to enforce a forfeiture of the lease, when it appears that the lessee (the sub-lessor) is a responsible party. *Boston & Maine R. Co. v. Boston & Lowell R. Co.*, 65 N. H. 398.

⁴ *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673.

⁵ *Meier v. Kansas Pacific R. Co.*, 5 Dill (U. S.) 476. Where two railroad companies are tenants in common of an easement, *v. g.* of the right of passage through a tunnel, and there is such a disagreement

between them as to their respective rights that the use of the easement is seriously interfered with a court of equity may intervene and enforce the recognition by each company of the rights of the other either by the appointment of a temporary receiver or otherwise. *Delaware, &c. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298. See also *Shrewsbury Ry. Co. v. Chester Ry. Co.*, 14 L. T. 217, 433; *Midland Ry. Co. v. Ambergate Ry. Co.*, 10 Hare, 359.

⁶ *Young v. Rollins*, 85 N. C. 485; 12 Am. & Eng. R. Cas. 455. But parties to the cause may, in some cases, agree upon the person to be appointed. See language of BREWER, J., in *Mercantile Trust Co. v. Missouri, &c. R. Co.*, 36 Fed. Rep. 221; 36 Am. & Eng. R. Cas. 259. A lessee may be appointed. See *Stevens v. Davison*, 18 Gratt. 819.

receiver of a railroad, who is not familiar with such business. A receiver being an officer of the court, and having the management of the property for it, and under its immediate direction, the court has an interest in having a competent person in that position; and an order made by it that the president and directors of the company remain in the management of the road under the order and subject to the control of the court has been held proper and to constitute them receivers.¹ Such appointments, however, are not favored. The appointment of a receiver, however erroneously made, cannot be attacked collaterally, and can only be set aside by proper proceedings brought for that purpose.²

SEC. 481. The Status of a Receiver: Suits.—A receiver, except by comity, has no authority as such, outside the jurisdiction of the court appointing him.³ But in many of the States, by comity, he is permitted to maintain actions in the courts of other States to protect the interests which he has in charge;⁴ and where in addition to his powers as receiver, he has acquired an interest by an assignment of the property to him or,⁵ by reducing it to possession, his right to maintain an action therefor in his own name in another jurisdiction is conceded.⁶ Thus, in a case in Tennessee, the plaintiff was

¹ *Gibbes v. Greenville, &c. R. Co.*, 15 S. C. 304; *in re Fifty-Four Mortgage Bonds*, 15 S. C. 394; 9 Am. & Eng. R. Cas. 739. But entire impartiality being the first requisite in a receiver, stockholders or directors of an insolvent company should not be appointed receivers of the road unless the case is exceptional and urgent, and then only upon consent of the parties whose interests are to be intrusted to their charge. *Atkins v. Wabash, &c. R. Co.*, 29 Fed. Rep. 161. It can rarely be proper to appoint as receivers the same persons through whose management the necessity for the receivership was created. *Richards v. Chesapeake, &c. R. Co.*, 1 Hughes (U. S.), 32. In the case of *Meier v. Kansas Pacific R. Co.*, 5 Dill. (U. S.) 476, the court observed: "While it may be true that a large personal interest may stimulate the activity and direct the vigilance of the receiver, it is equally true that such vigilance, whenever occasion offers, will be directed unduly to advancing that personal interest and that activity to securing personal advantages."

² *Richards v. People*, 81 Ill. 551.

³ *Florida v. Jacksonville, &c. R. Co.*, 15 Fla. 201; *Chicago, &c. R. Co. v. Keokuk Packet Co.*, 108 Ill. 317; *Booth v. Clark*, 17 How. (U. S.) 322; *Holmes v. Sherwood*, 16 Fed. Rep. 125; *Merchant's Bank v. McLeod*, 38 Ohio St. 174.

⁴ *National Ins. Co. v. Miller*, 33 N. J. Eq. 155.

⁵ *Graydon v. Church*, 7 Mich. 35.

⁶ *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580. When he has once reduced the property to his possession, he can take it into any jurisdiction and maintain his title to it by action, whether the technical title is in him or in the corporation. See *Chicago, &c. R. Co. v. Keokuk Packet Co.*, 108 Ill. 317. In a Connecticut case, — *Pond v. Cooke*, 45 Conn. 126, — it was held that when property has once vested in an assignee or receiver by the law of the State where the property is situated, the law of another State will not divest him of his right to it, if he should take it into such State in the performance of his duty. A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency. In that case a

appointed by a court in Arkansas receiver of the property of T., a defendant in a suit, and ordered to ship it to Memphis for sale, and to hold the proceeds subject to the order of the court. The property was shipped to Memphis, and there attached by T.'s creditors. It was held that the plaintiff could maintain replevin for the property in Tennessee, although he had not then qualified as receiver or given bonds.¹

It may be said to be the general rule that the powers of a receiver being coextensive only with the jurisdiction of the court appointing him, a foreign receiver will not be permitted, as against the claims of creditors resident in another State, to remove from another State the assets of the debtor, — it being the policy of every government to retain in its own hands the property of the debtor until all domestic claims against it have been satisfied.² But where a receiver has once obtained rightful possession of personal property situate within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession though he takes it, in the performance of his duty, into a foreign jurisdiction. While there it cannot be taken from his possession by creditors of the insolvent debtor who reside within such jurisdiction.³ But in some of the States, in the case of foreign corporations, creditors in such States are given the preference over the receiver appointed in another State, when they have attached the property of such corporation in the State; and if a receiver is subsequently appointed in such State, he takes the property subject to the liens

receiver of an insolvent manufacturing corporation, appointed by a court in New Jersey where it was located, took possession of its assets, and, for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with the funds of the estate, and sent it to that State. It was held, (1) That the iron was not open to attachment in Connecticut by a creditor residing there. (2) That a party giving a receipt for the property to the officer who attached it, and taking it into his possession, was not liable to nominal damages in a suit brought upon the receipt after a demand and refusal.

¹ *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580.

² *Chicago, &c. R. Co. v. Keokuk Packet Co.*, 108 Ill. 317. See also *Cantwell v. Sewell*, 5 H. & N. 728; *Clark v. Connec-*

ticut Peat Co., 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 16 Wall. (U. S.) 610; *Waters v. Barton*, 1 Cold. (Tenn.) 450; *Boyle v. Tonnes*, 9 Leigh (Va.), 158; *Singerly v. Fox*, 75 Penn. St. 114. Where a receiver takes possession of a large or other property, within the jurisdiction of the court appointing him, as the property of the insolvent debtor, he becomes invested with a special property in it, like that of a sheriff on a valid levy, and he may protect this special property while it continues, by action, in the same manner as if he were the absolute owner. *Chicago, &c. R. Co. v. Keokuk Packet Co.*, 108 Ill. 317.

³ *Pond v. Cooke*, 45 Conn. 126; *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580; *Kilmer v. Hobart*, 58 How. Pr. (N. Y.) 452.

created by the attachments.¹ Indeed, in all cases, the receiver takes the property subject to all legal liens upon it at the time it came into his possession.² He acquires no more or better title thereto than the corporation had.³ In the case of corporations formed by the concurrent action of two States, or of consolidated lines operated by the same corporation in two States, it is held that a receiver appointed by the courts of one State may exercise jurisdiction over the property in both States;⁴ and the courts of the other State will yield all necessary aid to give and maintain the receiver's possession of the property.⁵

The appointment of a receiver does not work a dissolution of the

¹ *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.), 353; *Dunlap v. Ins. Co.*, 12 Hun (N. Y.), 627.

² *Bell v. Sibley*, 33 Barb. (N. Y.) 610. In an Iowa case, — *Snow v. Winslow*, 54 Iowa, 200, — a receiver of a railroad was appointed in an action to which S., who held a mechanic's lien, was not a party. He was authorized by the court to complete the railroad and issue certificates therefor. The certificates were foreclosed and the road sold, the lien-holder not being a party to this proceeding. It was held that the lien of S. was not affected. A receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment. What expenses a receiver may properly incur becomes a question sometimes of great doubt and difficulty. The fundamental idea is that he must preserve the property, and hold the same to be disposed of under the orders of the court. To that end he may, under the direction of the court, make repairs. *Blunt v. Citherow*, 6 Ves. 799; *Attorney-General v. Vigor*, 11 id. 563; *Thornhill v. Thornhill*, 14 Sim. 600. A receiver of a railroad may operate it, and pay the expenses incident thereto, because this is deemed necessary for its proper preservation. *Ellis v. Boston, &c. R. Co.*, 107 Mass. 1. That he may even go further and provide additional accommodations, stock, etc., was held in *Cowdrey v. Galveston, &c. R. Co.*, 1 Woods (U. S.), 331. In *Wallace v. Loomis*, 97 U. S. 162, it was held that the receiver might issue certificates of indebtedness for rolling-stock, and that the same might be charged upon the

road as a lien paramount to subsisting liens. It was said, however, that the power should be exercised with great caution. In *Stanton v. Alabama, &c. R. Co.*, 2 Woods (U. S.), 506, it was held that the court might authorize the receiver to borrow money to complete an inconsiderable portion of the road, and make the sums borrowed a lien paramount to the first mortgage, it appearing to be necessary for the protection of the rights of the parties in interest. See also *Kennedy v. St. Paul, &c. R. Co.*, 2 Dill. (U. S.) 448, where certain work was authorized in making an extension which was necessary to prevent the forfeiture of an important land-grant, in which all parties were interested. It is said, however, in *High on Receivers*, § 390, that "the receiver is seldom authorized to enlarge the operations of the company, or extend its line of road, his functions being usually limited to the management of the property in its existing condition." But a lien may not be displaced by an order made in a proceeding to which the lien-holder is not a party.

³ *In re Le Blanc*, 4 Abb. (N. Y.) N. C. 221. His title to the property relates to the time of his appointment, without reference to the time when he became qualified to act. *Allen v. Central R. Co.*, 42 Iowa, 683; *Rutter v. Fallis*, 5 Sandf. (N. Y.) 610; *Steele v. Sturgis*, 5 Abb. Pr. (N. Y.) 442; *Metz v. Buffalo, &c. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201.

⁴ *Northern Indiana R. Co. v. Mich. Central R. Co.*, 15 How. (U. S.) 233.

⁵ *Wilmer v. Atlanta, &c. R. Co.*, 2 Woods (U. S.), 409.

corporation; the corporate existence remains unimpaired and the company may sue and be sued, and may exercise all its original franchises which are not in possession of the receiver.¹ Such an appointment does not put the annual meetings of the corporation under the control of either the receiver or the court, but the stockholders retain all the rights of electing the officers of the corporation which they had before the receivership.² The appointment of a receiver does not, therefore, abate suits pending against the corporation,³ nor does it prevent suits being brought against the corporation without leave of the court;⁴ but it does prevent the bringing of actions against the receiver himself, without leave of the court appointing him; and this rule applies to suits against him on a money demand or for damages, as well as to those the object of which is to recover property which he holds by order of that court.

¹ The case of *Ohio, &c. R. Co. v. Russell*, 115 Ill. 52; 23 Am. & Eng. R. Cas. 149, was an action to recover double the value of a fence built by the owner of land adjoining the road after the company had failed, after notice duly given, to construct it as required by statute. The company defended on the ground that its road was in the hands of a receiver. The court in holding that such a defence could not avail went on to say: "Notwithstanding the appointment of the receiver, the corporation is clothed with its franchises, and such corporation still exists. The effect of the appointment of the receiver is simply to give him the temporary management of the railroad under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that and nothing more. As the corporation still exists, it may still exercise, as before, its franchises, so it does not interfere with the rightful management of the road by the receiver, so far as his duties are defined by the court appointing him. No doubt it may do many corporate acts, and certainly it can do all things necessary to preserve its legal existence, notwithstanding the appointment of a receiver, to whom the temporary management of the road is given, — otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation. . . . The mere fact that its property may be temporarily in the hands of a receiver does not relieve

a corporation from the operation of such regulations, any more than a private citizen is released from the duty to observe the law because his property is sequestered by the order of the court for the benefit of his creditors." See similar language used as to the effect upon corporate existence of the appointment of a receiver, in *Louisville, &c. R. Co. v. Cauble*, 46 Ind. 277; *Wyatt v. Ohio, &c. R. Co.*, 10 Ill. App. 289; *Philadelphia, &c. R. Co. v. Com.*, 104 Penn. St. 80; 13 Am. & Eng. R. Cas. 367 (appointment of a receiver does not affect company's liability for taxes); *People v. Barnett*, 91 Ill. 422 (may still sue and be sued); *State v. Merchant*, 37 Ohio St. 251; 9 Am. & Eng. R. Cas. 516; *Jones v. Bank*, 10 Col. 464; *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.), 353. The company may enter into contracts or issue bonds just as before the appointment of the receiver. *McCalmont v. Philadelphia, &c. R. Co.*, 7 Fed. Rep. 386; 3 Am. & Eng. R. Cas. 163. Or it may elect officers and directors. *State v. Merchant*, 37 Ohio St. 251; 9 Am. & Eng. R. Cas. 516.

² *Farmers' & M. Bank v. Philadelphia, &c. R. Co.*, 14 Phila. (Penn.) 451.

³ *Toledo, &c. R. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613.

⁴ *Allen v. Central R. Co.*, 42 Iowa, 683; *Wyatt v. Ohio, &c. R. Co.*, 10 Ill. App. 289; *St. Joseph, &c. R. Co. v. Smith*, 19 Kan. 225. But see *Barton v. Barbour*, 104 U. S. 126.

The fact that by such order he is in possession of a railroad, and engaged in the business of a common carrier thereon, does not so far take his case out of the rule that an action will lie against him for an injury caused by his negligence, or that of his servants, in conducting that business. If the adjustment of a demand against him involves disputed facts, the court may, in a proper case, either of its own motion or on the prayer of the parties injured, allow him to be sued in a court of law, or direct the trial of a feigned issue to settle the facts.¹ A court of equity, however, has no jurisdiction of a suit involving solely a question of unliquidated damages arising from a tort. It will, therefore, refuse to entertain a bill filed to recover damages for the death of a person through the negligence of a railroad company, although the road, at the time of the injury, was in the hands of a receiver and under his entire control, and he has conveyed the road to purchasers, subject to all liabilities incurred by the receiver in operating the road.² The remedy in such a case, if the receiver is liable, is to settle the question of his liability by an action at law, and ascertain the amount of the damages there also, and then to file a bill against the purchasers from the lessee.³ A person having a legal cause of action sounding merely in tort against a receiver appointed by the court of chancery has a right to pursue his redress by an action at law. Such action cannot be brought without the permission of the chancellor, but such permission cannot be refused unless the claim preferred be manifestly unfounded and vexatious. The power of the chancellor in this respect was considered in a New Jersey case, and as the right of the chancellor to sanction the bringing of the action conferred a *scintilla* of jurisdiction over the case, and the parties proceeded to try the cause before the vice-chancellor, it was held that the court of appeals could lawfully exercise its jurisdiction by way of review, and, the decree being reversed, the complainant's damages could be ascertained and adjudged to him on the appeal.⁴ The United States courts hold that the rule requiring the leave of the court to bring an

¹ Barton v. Barbour, 104 U. S. 126 ; Kennedy v. Indianapolis, &c. R. Co., 3 Fed. Rep. 97 ; 2 Flip. (U. S.) 704 ; De Graffenreid v. Brunswick, &c. R. Co., 57 Ga. 22.

² Brown v. Wabash R. Co., 96 Ill. 297.

³ Brown v. Wabash R. Co., 96 Ill. 297.

⁴ Palys v. Jewett, Receiver, 32 N. J.

Eq. 302. The defendant railroad company was in possession and management of receivers appointed by the court of chancery. The petitions to recover for the injuries were properly brought to that court. Merrill v. Central Vt. R. Co., 54 Vt. 200. Contra, Wabash R. Co. v. Brown, 5 Brad. (Ill. App.) 590 ; affirmed, 96 Ill. 297.

action against a receiver is not overcome by a State statute abrogating the rule, or providing that certain classes of actions may be brought without such consent.¹ An execution cannot be levied upon property in the hands of a receiver. If a judgment creditor claims that he has a lien upon the property superior to the mortgage, or other creditors whom the receiver represents, his remedy is by applying to the court which appointed the receiver to have the property discharged from the custody of the receiver,² and any interference with the property which is wilful,³ or unwarranted,⁴ will be punished by the court as a contempt. The reason for this is, that the receiver is the agent of the court, and his possession is the possession of the court; therefore any interference therewith is an interference with property in the custody of the court.

Property in the hands of a receiver is *in custodia legis*.⁵ His possession is the possession of the court appointing him. No suit can be brought against him to disturb his possession, or to charge him with liability for an act done in the performance of his duties as such receiver without the consent of such court. Any one instituting such a suit without leave may be enjoined or attached for contempt. The proper proceeding is to apply to the court appointing the receiver, by petition, setting forth therein the grounds of complaint. Thereupon the court will direct a trial by a jury, reference to a master, or such other mode of proceeding as in its discretion it may deem best. The right of trial by jury in such a proceeding against a receiver, on a common-law cause of action, is not an absolute right, but the granting or withholding thereof lies within the

¹ Hale v. Duncan (U. S. C. Ct.), 7 Cent. L. J. 146.

² Skinner v. Maxwell, 68 N. C. 400; Coe v. Columbus, &c. R. Co., 10 Ohio St. 372; Robinson v. Atlantic, &c. R. Co., 66 Penn. St. 160.

³ Secor v. Toledo, &c. R. Co., 7 Biss. (U. S.), 513; King v. Ohio, &c. R. Co., 7 Biss. (U. S.) 529; Robinson v. Atlantic, &c. R. Co., 66 Penn. St. 160. Suing a receiver without leave of the courts is punishable as for a contempt. Thompson v. Scott, 4 Dill. (U. S.) 508; Gest v. New Orleans, &c. R. Co., 30 La. An. 28.

⁴ Richards v. People, 81 Ill. 551.

⁵ This being true, and the receiver being an officer of the court, any person interfering with the receiver's control of the road

may be summarily dealt with as for contempt of court. Thus, where striking workmen on another road interfere to prevent the employes of the receiver from working on his road, they may be held for contempt of court. Secor v. Toledo, &c. R. Co., 7 Biss. (U. S.) 513; King v. Ohio, &c. R. Co., 7 Biss. (U. S.) 539; *in re* Wabash R. Co., 24 Fed. Rep. 217; *in re* Higgins, 27 Fed. Rep. 443. But if the employes of the road operated by a receiver choose to abandon work, they have a right to do so, or to induce others, by persuasion or argument, to do so. But if they resort to threats or violence they are guilty of contempt. United States v. Kane, 23 Fed. Rep. 748; 25 Am. & Eng. R. Cas. 608.

sound discretion of the court. Such a proceeding is not a "suit at law" within the provision of the Constitution guaranteeing the right of trial by jury. Thus, in a case before the United States Circuit Court for the Southern District of Ohio, upon application of bondholders of the defendant road in a suit to foreclose their security, a receiver was appointed to operate the road. During such operation a train having run over a Mrs. C., a petition was filed in the foreclosure proceeding by her husband, as administrator, to recover damages for her death. It was held that the petitioner was not entitled to a trial by a jury.¹ But in some of the States it is denied that the receiver is the agent of the court appointing him,² and it is held that actions may be brought against him without leave of the court appointing him; but there can be no question that the rule is generally otherwise, and that reason and authority sustain it.³

This general rule that a receiver cannot be sued without leave of the court by which he was appointed applies to suits brought against him to recover a money demand or damages, as well as to those the object of which is to take from his possession property which he is holding by order of the court; nor does the fact that he is in possession of the road, and is, by the order of court, engaged in the business of a common carrier thereon, take his case out of the rule that he is only answerable to the court by which he was appointed, and cannot be sued without its leave.⁴ No suit can be

¹ *Kennedy v. Indianapolis, &c. R. Co.*, 3 Fed. Rep. 97.

² See *Allen v. Central R. Co.*, 42 Iowa, 683; *Kinney v. Crocker*, 18 Wis. 74; *Safford v. People*, 85 Ill. 558.

³ *Thompson v. Scott*, 4 Dill. (U. S.) 508. In *Kennedy v. Indianapolis, &c. R. Co.*, 3 Fed. Rep. 97, it was held that an action against the receiver of a railroad company, for damages for personal injury, cannot be sustained without leave of the court by which he is appointed, but that on application he will be permitted to go before a master, or sue in a court of law, and that he has no absolute right to a jury trial if the Court of Chancery choose to retain jurisdiction. BAXTER, J., says: "Such has been the uniform holding of the courts until recently, since which modifications of the rule have been attempted by a few exceptional adjudications, and by legislative enactments in some of the States. A statute of the kind exists in

Ohio. But this statute cannot control the action of this court. *Jones on Railroad Securities*, § 503; 7 Cent. L. J. 146; and *Thompson v. Scott*, 4 Dill. (U. S.) 508. Now can we yield to the modification of the rule adopted by some of the State courts. These decisions have been ably reviewed by LOVE, J., in the case of *Thompson v. Scott*, 4 Dill. (U. S.) 508, and his refutation of them maintained by a cogency of reasons that ought, we think, to forever foreclose all further discussion of the question. Mr. High, who advocates [in an article published in the *Southern Law Review*] the new doctrine, admits that 'the weight of authority is adverse to the exercise of any right of action against a receiver by any court other than that from which he derives his appointment, and to which he is amenable.'"

⁴ *Barton v. Barbour*, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1.

maintained against the receiver of a railroad who is by order of court conducting the business of a common carrier thereon, for injury to persons or property caused by his negligence, or that of his servants, without leave of the court by which he was appointed. The trial by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury. If the adjustment of a demand against the receiver involves any dispute in regard to the facts on which his liability depends, or in regard to the amount of the damages sustained, a court of equity, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts. A court of equity may in its discretion, in view both of the public and private interests involved, authorize its receiver of the road and other property of a railroad company to keep the same in repair and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested therein. Without leave of that court, a court of another State has, under such circumstances, no jurisdiction to entertain a suit against him for a cause of action arising in the State in which he was appointed, and in which the property in his possession is situated, based on his negligence, or that of his servants, in the performance of their duty in respect of such property.¹

¹ *Barton v. Barbour*, 104 U. S. 126. In this case *Wood, J.*, said: "The plaintiff in error concedes it to be a general rule, that before suit is brought against a receiver, leave should be obtained from the court by which he was appointed, and contends that the only consequences resulting from the prosecution of such a suit without leave, is that the plaintiff may be restrained by injunction, or attached as for a contempt. He insists, however, first, that the general rule requiring leave applies only to cases where the purpose of the suit is to take from the receiver property which is actually in his possession, placed there by order of the court. We conceive that the rule is not so limited. The evident purpose of a suitor, who brings his action against a receiver without leave, is to obtain some advantage over the other claimants upon the assets in the receiver's hands.

His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. *Hall v. Smith*, 2 Bing. 156; *Camp v. Barney*, 4 Hun (N. Y.), 373; *Commonwealth v. Runt*, 26 Penn. 235; *Thompson v. Scott*, 4 Dill. (U. S.) 588. If he has a right in a distinct suit to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it without leave. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would

A receiver has all the rights which the corporation itself had, and is entitled to pursue the same legal remedies; but as a rule he can-

be impotent to restrain him. The effect upon the property of the trust of any attempt to enforce satisfaction of his judgment would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver. A suit, therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is and effect of which may be, to take the property of the trust from the receiver's hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against the receiver to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained. And it has been so held in effect by this court. In the case of *Wiswall v. Sampson*, 14 How. (U. S.) 52, this court said: 'It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and the sale therefore in such a case should be upheld. But conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the result of the litigation and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree and the litigation become fruitless.' So in *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332, Lord ROMILLY, Master of the Rolls, said that it is an idle distinction that the rule forbidding any interference

with property in the course of administration in the Court of Chancery only applies to property actually in the hands of the receiver, and declared that it applied to debts, rents, and tolls which the receiver was appointed to receive. It is next asserted by plaintiff in error that the fact that the receiver in this case is in possession of and is conducting the business of a railroad as a common carrier, takes his case out of the rule that he is only answerable to the court by which he is appointed, and cannot be sued without its leave. His contention is that parties who deal with such a receiver either as freighters or passengers upon his railroad, may, for any injury suffered either in person or property, sue the receiver without leave of the court by which he was appointed. We do not perceive how the fact that the receiver under the orders of the court is doing the business usually done by a common carrier makes his case any exception to the rule under consideration. It was said by this court in *Cowdrey v. Galveston, &c. R. Co.*, 93 U. S. 352, that 'the allowance for goods lost in transportation and for damages done to property whilst the road was in the hands of the receiver was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind as well as the expenses incurred in their behalf were paid.' This puts claims against the receiver in his capacity as a common carrier on the same footing precisely as the salaries of his subordinates or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured in person or property by the negligence of the servants of the receiver, can without leave sue him to recover his damages, then every conductor, engineer, brakeman, or track-hand can also sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property in the hands of a court of equity to be controlled

not sue without first obtaining leave from the court appointing him.¹ If two or more receivers are appointed of the same property by the different courts, it is the generally accepted doctrine that the court first taking jurisdiction and control is entitled to retain jurisdiction until the litigation is ended,² and to take and retain the pos-

by other courts, at the instance of impatient suitors, without regard to the equities of other claimants and to permit the trust property to be wasted in the costs of unnecessary litigation. Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts. The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while travelling on the railroad, managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way. We therefore think that the demand of the plaintiff in error is not of such a nature that it may be prosecuted by suit without leave of the court." The court also held that the plaintiff's second contention that want of leave to bring the suit does not take away the jurisdiction of the court in which it was brought to hear and determine it, but only subjects the plaintiff to liability to be attached for contempt or to be enjoined from its further prosecution, could not be upheld: *Barton v. Barbour*, 104 U. S. 126. See as to this last holding, *Peale v. Phipps*, 14 How. (U. S.) 368.

¹ *Screven v. Clark*, 48 Ga. 41; *Parker v. Browning*, 8 Paige (N. Y.), 388.

² *Sedgwick v. Meach*, 6 Blatchf. (U. S.) 156; *Bell v. New Albany, &c. R. Co.*, 2 Biss. (U. S.) 390; *Union Trust Co. v. Rockford, &c. R. Co.*, 6 Biss. (U. S.) 197; *Memphis*

v. Dean, 8 Wall. (U. S.) 64. If a receiver appointed by another court, on a bill filed while the controversy is pending, takes prior possession of the *res*, his possession is wrongful and should give way to the prior jurisdiction of this court. *Gaylor v. Fort Wayne, &c. R. Co.*, 6 Biss. (U. S.) 286; *Union Trust Co. v. Rockford, &c. R. Co.*, 6 Biss. (U. S.) 197. Where a receiver who has been appointed by a State court in the interest of the creditors of a construction company proceeds with the work of construction by entering into contracts, etc., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a Federal court, especially after the State court has proceeded, without objection, to adjudicate upon the rights of the parties. *Buell v. Cincinnati, &c. Const. Co.*, 9 Fed. Rep. 351. Where a State court, on a bill of like character with one pending in the United States court, appoints a receiver inadvertently, and without knowledge of the facts in the Federal court, and the circumstances indicate collusion in the State court, the appellate court will not interfere with the judge of the State court in revoking the order appointing his receiver, and turning over the property to the receiver of the United States court. *May v. Printup*, 59 Ga. 128. An order was granted by a justice of the Supreme Court at chambers in the first district, appointing a receiver of the property, franchise, and effects of the defendant. It did not appear that the order had ever been entered in the second department. It was held that, being a chamber order, no appeal from it would lie until it had been so entered. *Clinch v. South Side R. Co.*, 2 Hun (N. Y.), 154. Where a conflicting question of jurisdiction arose between the Superior Courts of two counties in the matter of the appointment of a receiver for the defendant corporation, who, pending the

session of the property, without interference from other courts, unless a receiver subsequently appointed has first taken possession of the property, in which case, it seems that priority of possession gives the better right to its control.¹ The court appointing a receiver may take cognizance of questions involving the receiver's liability, or may permit them to be tried in a court of law, unless the jurisdiction of the court is assailed.² In Vermont, it has been held that the court has power to restrain parties within its jurisdiction from prosecuting suits in foreign courts which interfere with the receiver's possession and control of the property.³ If a receiver appointed by one court is in possession of the property, he is not amenable to suit in another court in respect thereto; and if the property has passed beyond his control, he would not in any event be a necessary party in a proceeding to adjudge a lien on such property still subsisting, notwithstanding the proceedings in the court wherein he was appointed receiver.⁴ In a Kansas case,⁵ a county treasurer filed his petition in the district court against a railroad company, and a receiver of the company appointed by the circuit court of the United States, to recover the taxes levied upon the company for the year 1874. The petition alleged the appointment of the receiver and his possession and control of the road. Without, so far as the record disclosed, the issue or service of any process, the company and receiver filed a joint answer, in which they admitted that a portion of the taxes were properly chargeable against the company, and consented that judgment might be rendered against them in the action for that amount; and also alleged the appointment of the receiver by the United States

controversy, was duly elected president thereof, it was held that the Supreme Court, without expressing an opinion, should affirm the order below appealed from, as it will not decide a question of great importance except where it is necessary to protect a substantial right. *Com'rs of Craven County v. Atlantic, &c. R. Co.*, 77 N. C. 297. Where a State court, on a petition under the Indiana statutes to dissolve a corporation, has taken jurisdiction and decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States

court. *Conkling v. Butler*, 4 Biss. (U. S.) 22. But the fact that the property is being administered upon in proceedings taken in a State court, and that the plaintiff might apply to that court for relief, is no bar to the institution of proceedings in the Circuit Court of the United States. *Griswold v. Central Vermont R. Co.*, 9 Fed. Rep. 797.

¹ *BRADLEY, J.*, in *Wilmer v. Atlanta, &c. R. Co.*, 2 Woods (U. S.), 425.

² *Klein v. Jewett*, 26 N. J. Eq. 474.

³ *Vt. & Canada R. Co. v. Vt. Central R. Co.*, 46 Vt. 792.

⁴ *Mass. Mutual L. Ins. Co. v. Chicago, &c. R. Co.*, 13 Fed. Rep. 857.

⁵ *St. Joseph, &c. R. Co. v. Smith*, 19 Kan. 225.

Circuit Court, that he was not amenable to the process of the District Court, and prayed that as to him the suit might be dismissed. It was held that the District Court had jurisdiction, and properly rendered judgment against the receiver. The jurisdiction of the court first attaching may be said to be unquestionable. Chief Justice MARSHALL announced the rule in an early case,¹ as follows: "Of two courts having concurrent jurisdiction of any matters, the one whose jurisdiction first attaches acquires exclusive control of all controversies respecting it involving substantially the same interests;" and this rule is almost universally followed.² It has been held that,

¹ *Smith v. McIver*, 9 Wheat. (U. S.) 532.

² *Mallett v. Dexter*, 1 Curt. (U. S.) 178; *The Robert Fulton*, 1 Paine (U. S.), 621; *ex parte Robinson*, 6 McLean (U. S.), 355; *Board of Missions v. Mc-Masters*, 4 Am. Law Rev. 526; *ex parte Sifford*, 5 id. 659; *Parsons v. Lyman*, 5 Blatchf. (U. S.) 170; *United States v. Wells*, 20 Am. Law Rev. 424; *Crane v. McCoy*, 1 Bond (U. S.), 422; *Blake v. Railroad*, 6 N. B. R. 331; *Levi v. Life Ins. Co.*, 1 Fed. Rep. 206; *Hamilton v. Chouteau*, 6 Fed. Rep. 339; *Ins. Co. v. University of Chicago*, 6 Fed. Rep. 443; *Walker v. Flint*, 7 Fed. Rep. 435; *Wire Co. v. Wheeler*, 11 Fed. Rep. 206; *Ins. Co. v. Railroad*, 13 Fed. Rep. 857; *The J. W. French*, 6 Fed. Rep. 916; *Stout v. Lye*, 103 U. S. 66. In a case where the Supreme Court of New Hampshire decreed the foreclosure of a deed of trust and mortgage of a railroad, and the property was actually sold, it was held that the Circuit Court of the United States could not entertain a bill to enforce the operation of the road by trustees for the benefit of its stockholders, although the bill was filed before the sale, and the sale when made was declared to be subject to the result of the suit in the Circuit Court. *CLARK, D. J.*, said: "The possession of a receiver is the possession of the court appointing him, and cannot be divested by a court of co-ordinate jurisdiction." *Bruce v. Manchester, &c. R. Co.*, 19 Fed. Rep. 342; *Taylor v. Carryl*, 20 How. (U. S.) 583; *Hagan v. Lucas*, 10 Pet. (U. S.) 100; *Freeman v. Howe*, 24 How. (U. S.) 450; *Buck v. Colbath*, 3 Wall. (U. S.) 834; *Walker v. Flint*, 7 Fed. Rep. 435. In *Andrews v.*

Smith, 5 Fed. Rep. 833, in a suit by the first-mortgage bondholders of the Vermont Central Railroad against the mortgage trustees, for holding the trustees accountable for moneys alleged to have been taken by them from the trust funds in their hands in violation of their trust, the defendants pleaded that during the period of the accounting called for they had been in possession of the railroad as receivers or officers of the Court of Chancery of Franklin County, Vermont, and as such receivers, had already rendered an account to the Court of Chancery for the sums claimed in the suit, and so they could not be held chargeable therefor in any proceeding for that purpose in this court; or that if they were otherwise so chargeable, yet as the same subject-matter was previously before the State court for adjudication, this court should dismiss the plaintiffs' bill, out of comity towards the State court. The defendants also contended that if they had ceased to be receivers of the State court prior to the origin of the demand in suit, yet no order for discharging them as receivers had ever been entered in the State court, and that this court should still regard them as official receivers of the State court. It was held by *WHEELER, D. J.*, that the receivership formerly existing in the State court had practically ceased prior to the period covered by the accounting claimed in this case, and that the State court had so determined, and that as the parties themselves had brought the receivership to a close by their own acts, no formal entry in court of such discharge was necessary, and that as the parties to the proceeding in the State court were not the same as the parties in this

when a receiver of a railroad company has been appointed by a United States court, another corporation can acquire no right of way over the line by proceedings for its condemnation;¹ but it is not believed that this doctrine can be sustained either in reason or upon authority. The right of eminent domain is a public right, existing for the benefit of the public, and it cannot be legally suspended by the action of any court, State or national, in any collateral proceedings, or because the land is in the custody of the court. The receiver and the corporation being made parties to such proceedings, there can be no doubt that a good title under such proceedings may be obtained.

SEC. 482. Liability of Receiver as Common Carrier, for Negligence, etc. — There seems to be no good reason why a receiver, operating a railway as the agent of the court appointing him, and deriving no profit or advantage to himself therefrom, should be liable for the negligence of his employes therein, in the same manner and to the same extent that the corporation would be if it was operating the road, and the better rule seems to be that he is only liable in his official capacity for such injuries;² and accordingly it has been held that where an action is brought against him in his individual capacity, it will be enjoined upon a bill brought for that purpose.³

case, the pendency of such proceedings would be no bar to this suit. Also, that the rule of comity towards the State court could not operate to deprive this court of its own rightful jurisdiction. *Stanton v. Embrey*, 93 U. S. 548; *Cook v. Burnley*, 11 Wall. (U. S.) 668; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1; *Harris v. Dennie*, 3 Pet. (U. S.) 292; *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Anonymous*, 6 Ves. 287; *Angel v. Smith*, 9 id. 335; *Booth v. Clark*, 17 How. (U. S.) 322; *Peck v. Jenness*, 7 How. (U. S.) 612; *Vermont, &c. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500; *Mallett v. Dexter*, 1 Curt. (U. S.) 178; *Erwin v. Lowery*, 7 How. (U. S.) 172; *Snydam v. Broadnax*, 14 Pet. (U. S.) 67; *Union Bank v. Jolly*, 18 How. (U. S.) 503; *Shelby v. Bacon*, 10 How. (U. S.) 56; *Green v. Creighton*, 23 How. (U. S.) 90; *Davis v. Duke of Marlborough*, 2 Swanst. 113; *Milwaukee, &c. R. Co. v. Soutter*, 2 Wall. (U. S.) 510;

Windsor v. McVeigh, 93 U. S. 274; *Payne v. Hook*, 7 Wall. (U. S.) 425.

¹ *Western Union Tel. Co. v. Atlantic, &c. Tel. Co.*, 7 Biss. (U. S.) 367.

² *Camp v. Barney*, 4 Hun (N. Y.), 373; *Central Trust Co. v. Wabash, &c. R. Co.*, 26 Fed. Rep. 12 (failure to fence, receiver held liable); *McNulta v. Ensich*, 134 Ill. 46; *Henderson v. Walker*, 35 Ga. 481; *Thurman v. Cherokee, &c. R. Co.*, 56 Ga. 376 (injury to employe); *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; 11 Am. & Eng. R. Cas. 145; *Cardot v. Barney*, 63 N. Y. 281; 20 Am. Rep. 533; *Kain v. Smith*, 80 N. Y. 458. In this last case, however, where the receiver appointed by the courts of Vermont, leased a line of railroad in New York, the court held that as the court appointing him had no control over the leased road, he was liable individually for its management. *Gibbs v. Greenville, &c. R. Co.*, 15 S. C. 518; *Rogers v. Mobile, &c. R. Co.*, 12 Am. & Eng. R. Cas. (Tenn.) 442; *Cardot v. Barney*, 63 N. Y. 281.

³ *Camp v. Barney*, 4 Hun, 373.

But for his own personal wrongs or negligence he is, as a matter of course, personally liable.¹

At law, a receiver operating a railway is treated as a common carrier, and is liable as such;² but unless some personal iniquity on his part is shown, the liability is not personal. He is a mere officer of the court which has the property in charge, and no responsibility attaches to him personally except for his own official misconduct.³ The usual practice is to allow the receiver to be sued by leave of court, and a personal judgment to be taken against him to be paid out of the current funds of the company in his hands.⁴ But where he acts in a dual capacity, as a receiver and a trustee, he may be held personally liable.⁵

The receiver may avail himself of any defences, statutory or otherwise, of which the company might avail itself. In the operation of the road he stands in the place of the company, and, to a certain limited extent, may perhaps be said to act as its agent.⁶ Thus, in

¹ *Hopkins v. Connell*, 2 Tenn. Ch. 323.

² *Little v. Dusenberry*, 46 N. J. L. 614; 50 Am. Rep. 445; 25 Am. & Eng. R. Cas. 632; *Davis v. Duncan*, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295; *Cowdrey v. Galveston, &c. R. Co.*, 93 U. S. 352; *Bell v. Indianapolis, &c. R. Co.*, 53 Ind. 47; *Kansas Pac. R. Co. v. Searle*, 11 Col. 1; 35 Am. & Eng. R. Cas. 6; *Nichols v. Smith*, 115 Mass. 332.

³ *Texas Pacific R. Co. v. Collins*, 84 Tex. 121; *Turner v. Cross*, 83 Tex. 218, 607; 18 S. W. Rep. 578; *Houston, &c. R. Co. v. Roberts* (Tex.), 19 S. W. Rep. 512; *Texas, &c. R. Co. v. Bailey*, 83 Tex. 19; *Ryan v. Hays*, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; *Davis v. Duncan*, 19 Fed. Rep. 477; 17 Am. & Eng. R. Cas. 295; *Rogers v. Wheeler*, 43 N. Y. 602; *Kain v. Smith*, 80 N. Y. 458; *Barton v. Barbour*, 104 U. S. 126; 4 Am. & Eng. R. Cas. 1; *Melendy v. Barbour*, 78 Va. 544; 25 Am. & Eng. R. Cas. 622; *San Antonio, &c. R. Co. v. Ruby* (Tex.), 15 S. W. Rep. 1040; *Bonner v. Mayfield*, 82 Tex. 234. Compare, *Kinney v. Crocker*, 18 Wis. 80; *Paige v. Smith*, 99 Mass. 395. After his discharge, therefore, a recovery cannot be had against the receiver for injuries suffered from the negligence of train operatives while he was in charge of the road. *Davis v. Duncan*, 19 Fed. Rep. 477; 17 Am. &

Eng. R. Cas. 295; *Ryan v. Hayes*, 62 Tex. 42; 23 Am. & Eng. R. Cas. 501; *Texas, &c. R. Co. v. Adams*, 78 Tex. 372; *Farmers' L. & T. Co. v. Central R. Co.*, 7 Fed. Rep. 537. In *Blumenthal v. Brainerd*, 38 Vt. 402, it was held that a plea that the defendant was acting as receiver, is no defence at law. *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424. See also *Newell v. Smith*, 49 Vt. 255; *Cowdrey v. Galveston, &c. R. Co.*, 93 U. S. 352.

⁴ *Klein v. Jewett*, 26 N. J. Eq. 477; *Murphy (sub nom. Meara) v. Holbrook*, 20 Ohio St. 137. See *ante*, § 345 a.

⁵ *Vt. & Canada R. Co. v. Vt. Central R. Co.*, 50 Vt. 500.

⁶ *Bartlett v. Keim*, 50 N. J. L. 260. The statute provided that "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect, or default of any railroad corporation, owning or operating any railroad in this State, shall be commenced and sued within two years next after the cause of such actions shall have accrued and not after." *BEASLEY, C. J.*, speaking for the court said "The counsel of the plaintiff contend that the statute above recited has no applicability to a suit against a receiver—the argument being that the provision by its terms has relevancy only to wrongful acts done by railroad companies, and that

the case last cited, in an action by a passenger, for an injury resulting from negligence in the operation of the train upon which the plaintiff was riding, it was held that the defendants might avail themselves of the limitation of two years, provided by statute, within which actions shall be brought against railroad corporations, or be forever barred.¹

SEC. 483. Judgments against a Receiver, Right to pay Claims, etc.

— A judgment against a receiver appointed under foreclosure proceedings cannot take precedence of the mortgage debt, except, as has been seen, where it is for a debt constituting a part of the operating expenses of the road. Thus, pending the foreclosure of a railway mortgage, the plaintiff commenced an action against the receiver in charge of the road to recover for personal injuries sustained through

in this case the tort complained of was the tort of the receiver and not that of the corporation. But unless we are to mistake the shadow for the thing itself, this position is not tenable. This suit in effect is an effort to charge a suable wrong upon this railroad company. A judgment in this action would constitute an equitable claim upon the property of the corporation and would not subject the receivers to any personal responsibility. It is the person whose property will be applied to the payment of the judgment who is the real defendant.

"These suits against receivers are anomalous in their nature; they are, in fact, the creatures of a court of equity, and are not to be assimilated in all respects to any of the ordinary procedures known to the courts of common law. In that case if a judgment should be obtained, it would not constitute a lien on the property of either the nominal or real defendant; it could not be enforced by execution. In short the action is simply the means adopted by the court of chancery, to ascertain whether the plaintiff has a cause of action, and if so, the amount of damages which has accrued.

"The receiver within the sphere of his functions represents the company; by virtue of such a relationship he exercises all its necessary franchises; and, in my opinion, he is its agent appointed, not by the corporate body itself, but by the law for certain ends of its own. It is the corporation that ultimately reaps the benefits

of his services; if he runs the road at a profit, the result is its debts are paid and the surplus earnings are deposited in its coffers. So far as transacting the business of the road is concerned the receiver does precisely what the directors, if they had remained in the management, would have been required to do. I am at a loss to see, therefore, where the receiver engages employes in such business why they are not to be regarded as the employes of the company itself. Unless this be so it is difficult to suggest any principle upon which the property of the company in the hands of the receiver is made responsible for the damages resulting from the negligences and misconduct of such employes; and on the other hand it is the company that receives the benefit of their services. Nor is it true, as has been sometimes said, that the company has no control over these employes, — for this is to deny that the receiver is the agent of the company, for if he be such agent the corporation controls these servants through him. In my opinion this view best harmonizes the legal status of property in the hands of a receiver with the general principles of law.

"From this hypothesis it necessarily follows that as the company is the real defendant, it is entitled to all the defences that would have belonged to it if it had appeared *in propria persona* as defendant on the record — and one of such defences is that given by the statute in question."

¹ Bartlett v. Keim, 50 N. J. L. 260; 13 Atl. Rep. 7.

the alleged negligence of the receiver's employes between the date of the foreclosure sale and the execution of the sheriff's deed thereon. After the receiver had appeared and answered in the action, a sheriff's deed was executed, and the receiver made final settlement and was discharged. It was held that the judgment subsequently rendered in the action against the receiver did not become a lien against the property in the hands of the purchaser at the foreclosure sale.¹ But inasmuch as a receiver of a railroad appointed in foreclosure proceedings is the agent of the bondholders and trustees, a judgment rendered against him by a court of competent jurisdiction for any of the expenses incident to operating the road is binding upon the interests of the bondholders.² Judgments obtained against the corporation *after* a receiver is appointed do not constitute a lien upon the property,³ and afford no evidence against the receiver.⁴ Claims for damages sued against a corporation itself, while in the hands of receivers, and reduced to judgment (in one case by consent of its officers, who were also the receivers), and afterwards presented and allowed as original claims against the receiver

¹ *White v. Keokuk, &c. R. Co.*, 52 Iowa, 97.

² *Turner v. Indianapolis, &c. R. Co.*, 8 Biss. (U. S.) 527; *Miltner v. Logansport R. Co.*, 106 U. S. 236. See *ante*, § 475 a. A railroad company having, by contract, the right to run over the defendant's road, upon accounting to the defendant by the 15th of each month for the month preceding, and paying the ascertained balance due within ten days thereafter, and being three months in arrears, the receiver of the defendant road severed the connection between the roads. On petition to restore connection, and for damages for interruption of business, it was held that under the circumstances, the petitioners were not entitled to relief on the ground of oppressive and unwarranted conduct on the part of the receiver. *Elmira Rolling Mill Co. v. Erie R. Co.*, 26 N. J. Eq. 284. A receiver appointed by the governor has no right so to lease a railway as to vest the lessees with an interest which cannot be taken away by a subsequent act of the Legislature. *McMinnville, &c. R. Co. v. Huggins*, 3 Baxt. (Tenn.) 177; 20 Am. Ry. Rep. 173. A railroad company in Iowa, after executing a mortgage to secure its bonds, which was duly recorded, cover-

ing all the property which it then possessed, or might thereafter acquire, entered into a written contract with A., leasing for a specific period and a stipulated sum, payable monthly, certain cars whereof he was the owner. It also reserved, but did not exercise the privilege of purchasing them at the original cost at any time during the existence of the contract. A. retained the right to rescind the contract if the company failed to pay the interest on its bonds. While the contract was in force, the mortgagee filed his bill of foreclosure. The court appointed a receiver, who took charge of the road and used the cars in operating it. The contract was never recorded. It was held that the contract was binding between the parties thereto, and the failure to record it did not, under the statute of Iowa, render the cars subject to the lien of the mortgage; that A. was entitled to the possession of them and to compensation for their use by the receiver, payable out of the fund to the credit of the suit. *Myer v. Car Co.*, 102 U. S. 1.

³ *Bell v. Chicago, &c. R. Co.*, 34 La. An. 785.

⁴ *Connell v. Washington*, 2 Tenn. Ch. 323.

er's fund, are not entitled, as against that fund, to interest, either from the date of the judgments or from the order giving to them the right of payment, — such order not having fixed the amounts due.¹ Neither the railroad company itself, nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied.²

A court of equity has the power to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage. Thus, it may provide that the receiver shall pay the arrears due for operating expenses for a period in the past, not exceeding ninety days, and pay indebtedness, not exceeding a certain sum, to other connecting lines, for materials and repairs, and for ticket and freight balances, — a part of which had been incurred more than ninety days before the order appointing him was made, — and purchase rolling-stock, and build a certain number of miles of road, and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgages.³ But a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.⁴ The law relating to such matters, however, more properly belongs to the subject of priorities, and has already been examined.⁵

As a general rule, a receiver appointed in one suit should not be displaced by the appointment of a receiver in a subsequent action. The receivership in the first suit should be extended to the second. But, however, if a different receiver is appointed, and the court has jurisdiction of the subject-matter and the parties, and is the same

¹ *Gibbs v. Greenville, &c. R. Co.*, 18 S. C. 87.

² *North Carolina R. Co. v. Drew*, 3 Woods (U. S.), 691. See also *Meyer v. Johnston*, 53 Ala. 237; *Denniston v. Chicago, &c. R. Co.*, 4 Biss. (U. S.) 414. A

receiver may be garnished. See *Phelan v. Ganebin*, 5 Col. 14.

³ *Miltenerberger v. Logansport R. Co.*, 106 U. S. 286.

⁴ *Cowdrey v. Galveston, &c. R. Co.*, 93 U. S. 352.

⁵ See *ante*, § 475 a.

court that made the first appointment, the receiver in the first suit must deliver the property to the second receiver.¹

Where no lien is created by a contract, it will not be specifically enforced against the receiver. Thus, a contract between A., a railroad company, and B., an express company, stipulated that B. should lend A. \$20,000, to be expended in repairing and equipping its road, and that A. should grant to B. the necessary privileges and facilities for the transaction of all the express business over the road, — the sum found to be due A. therefor, upon monthly settlement of accounts, to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money with interest thereon was not paid, it was to continue in force until payment should be made. After B. had advanced the money, and entered upon the performance of the contract, A. conveyed all its property, including its franchises, to C. in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C. brought a foreclosure suit, and obtained a decree, placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B., the latter, with the consent of the court, brought its bill in equity for specific performance against him, A., and C. It was held that the receiver is the only necessary party defendant; that the transaction between the companies is not a license, but simply a contract for transportation, creating no lien, the specific performance whereof would be a form of satisfaction or payment which the receiver cannot be required to make.²

SEC. 483 a. Receiver's Certificates. — The imperative necessity that a railway should be kept in proper repair and operation necessarily carries authority upon the part of a court appointing a receiver to authorize him to incur liabilities which shall take precedence over all other claims which are indispensable for the preservation of the property while the litigation is pending.³ Otherwise the interests of the bondholders or creditors, as well as of the corporation itself, would be sacrificed. Therefore the court may authorize him to borrow money and issue certificates or other obligations therefor,

¹ *State v. Jacksonville, &c. R. Co.*, 15 117 U. S. 434; *Wallace v. Loomis*, 97 U. Fla. 201. S. 146; *Miltenberger v. Logansport R. Co.*,

² *Express Co. v. Railroad Co.*, 99 U. S. 106 U. S. 286; *Turner v. Peoria, &c. R. Co.*, 95 Ill. 134; 1 Am. & Eng. R. Cas. 191.

³ *Meyer v. Johnston*, 53 Ala. 237; 348; 35 Am. Rep. 144; *Beach on Receiv- Union Trust Co. v. Ill. Midland R. Co.*, ers, § 379.

which shall be a lien upon the property prior to the mortgage, to complete an unfinished portion of the road,¹ to make repairs thereon,² to pay the rent upon leased lines,³ or for materials furnished, for labor, or indeed for any obligation *which is necessary to preserve, maintain, and operate the road in a suitable manner.*⁴ *The necessity of the expenditure affords the true test of its propriety as well as of the measure of the authority of the court to permit it and create a prior lien upon the road therefor,*⁵ unless the bondholders or other

¹ *Stanton v. Alabama, &c. R. Co.*, 2 Woods (U. S.), 506; *Kennedy v. St. Paul, &c. R. Co.*, 2 Dill. (U. S.) 448; 5 Dill. 519 (completion necessary to prevent lapse of a valuable grant); *Bank v. Chicago, &c. R. Co.*, 48 Iowa, 518. But the issuance of receiver's certificates for such a purpose is to be discouraged and is rarely allowed. The common-law rule is applicable in this connection, which allows the mortgagee in possession to make reasonable and necessary repairs, but not to "improve the mortgage out of his estate." *Shaw v. Little Rock, &c. R. Co.*, 100 U. S. 612. See *Jerome v. McCarter*, 94 U. S. 734, where such authority was given to complete a canal.

² *Meyer v. Johnston*, 53 Ala. 237; *Hoover v. Montclair, &c. R. Co.*, 29 N. J. Eq. 4; *Vermont, &c. R. Co. v. Vt. Central R. Co.*, 50 Vt. 500; *Vilas v. Page*, 106 N. Y. 439.

³ *Vt. & Canada R. Co. v. Vt. Central R. Co.*, 50 Vt. 500.

⁴ *Coe v. N. J. Midland R. Co.*, 27 N. J. Eq. 37. For the purchase of rolling-stock, machinery, and supplies, and for such other things as are necessary for the proper operation of the road, and which can properly be embraced in the "operating expenses." *Wallace v. Loomis*, 97 U. S. 146; *Swan v. Clark*, 110 U. S. 602; 17 Am. & Eng. R. Cas. 354; *Turner v. Peoria, &c. R. Co.*, 95 Ill. 134; 35 Am. Rep. 144; *Bank of Montreal v. Chicago, &c. R. Co.*, 48 Iowa, 518. See also *Gibert v. Washington, &c. R. Co.*, 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Cas. 473.

⁵ *Cowdrey v. Galveston, &c. R. Co.*, 1 Woods (U. S.), 331. The court may authorize the receiver to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and im-

provements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise, except to a very limited extent, the sound practice is to discharge the receiver or stop running the road and speed the foreclosure. But it is not a judicial duty to build railroads; and the agreement, or assent of all the parties interested in the property cannot make it one; and there is no difference in principle between a court building a railroad by the issue of receivers' certificates and making extensive and general repairs and betterments, approximating the original cost of construction by like means. Such certificates reciting upon their face that they were issued under the order of court, the holder is chargeable with the notice of the order, and in taking them is bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time. *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46. An application by receivers of an insolvent railroad to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of which was not before the court. *Coe v. N. J. Midland R. Co.*, 27 N. J. Eq. 37. And the court will not generally authorize the issue of receivers' certificates of indebtedness, unless a detailed statement is first made out specifying the items of the sum needed and the purposes to which it is to be applied, supported by clear proof of the correctness thereof, and of the necessity for raising the money, and after proper notice to, and hearing of, the parties interested. *Meyer v. Johnston*, 53 Ala. 237. Where a court orders a receiver to issue certificates of indebtedness for a

parties in interest have asked for such authority, or knowing of the application to the court for such authority have not objected thereto, in which case they cannot complain that their securities are made subsidiary.¹ Upon no other ground, except in those States where the statute so provides,² can it with any reason or propriety be held that the receiver can displace the mortgage, except for purposes absolutely necessary and indispensable to preserve the property in the condition in which it was received.³ The power to issue such certificates is, therefore, not entirely discretionary; the discretion of the court is limited by the settled principles of equity. The court, acting through its receiver, has no power to impair the obligation of the mortgage contract by creating a superior lien on the property without the mortgagee's consent, unless it be in the exercise of its equitable power of preserving and protecting the property. The law does not permit the obligation of contracts to be thus impaired.⁴

specific purpose, to be made payable to the persons to whom delivered or order, and one is issued to A. B. or bearer," which is negotiated by mere delivery, the holder will take the same subject to all equitable defences against the payee; and the printed order of the court on its back is notice to him that it was made payable to bearer contrary to the order of the court authorizing the issue. *Turner v. Peoria, &c. R. Co.*, 95 Ill. 134. A court of chancery has power, after proper notice to and hearing of interested parties, to authorize the issue even of negotiable certificates of indebtedness, creating a first lien, displacing other liens to that extent, on the property of a railroad which it is operating through its receiver, whenever it is necessary to raise money for the economical management and conservation of the property. *Meyer v. Johnston*, 53 Ala. 237. But where a receiver of a railroad was, by order of court, authorized to issue receivers' certificates to a certain amount, the proceeds to be used in operating the road, and to be paid out of the receipts of the road, an issue of certificates in excess of the amount ordered was beyond the power of the receiver, and as to such excess, the certificates were void even in the hands of an innocent holder, and constituted no claim upon the money in the hands of the receiver. *Newbold v. Peoria, &c. R. Co.*, 5 Ill. App. 367. These

certificates are not ordinarily negotiable. Where a receiver, acting under a special order of the court, issued a certificate and placed it in the hands of the payee named therein for negotiation and sale, and the same subsequently came into the hands of the petitioner, who purchased it of a third party for forty per cent of its par value, and with notice of the order under which it was issued, it was held that he took it subject to all equities between the receiver and the payee, and that, as it appeared that the latter had never accounted to the receiver for the certificate or its proceeds, the petitioner was not entitled to payment. The negotiation and sale of certificates is a trust personal to the receiver; he cannot delegate it to another and relieve himself from responsibility. *Union Trust Co. v. Chicago, &c. R. Co.*, 7 Fed. Rep. 513.

¹ *Jerome v. McCarter*, 94 U. S. 734.

² As in New Jersey, Ohio, and Vermont, where receivers are authorized to create a prior lien upon the property for certain purposes.

³ *Jerome v. McCarter*, 94 U. S. 734; *Shaw v. Little Rock, &c. R. Co.*, 100 U. S. 612; *Hand v. Savannah, &c. R. Co.*, 10 S. C. 406.

⁴ *Jones on Railroad Securities*, § 539. *Meyer v. Johnston*, 53 Ala. 237; *Credit Co. v. Ark. Central R. Co.*, 15 Fed. Rep. 46. The certificate must be issued in strict

These certificates are held not to be commercial paper, and therefore not strictly negotiable even though made payable to bearer or the order of a certain person, and the holder takes them subject to all existing equities.¹ An indorsement by the assignor does not make him liable as guarantor nor imply a warranty that the certificate is collectable or will be paid.² Holders, even though they may be *bonâ fide* purchasers for value, acquire no rights other than those possessed by their assignors, and certificates in their hands are invalid if issued irregularly or without authority.³

SEC. 484. **Removal or Discharge of a Receiver.**⁴ — Inasmuch as a

accordance with the terms of the order, and for the express purposes mentioned in it. *Newbold v. Peoria, &c. R. Co.*, 5 Ill. App. 367. The terms of the order authorizing the issue of certificates cannot be extended by implication. *State v. Edgefield, &c. R. Co.*, 6 Lea (Tenn.), 353.

¹ *Stanton v. Alabama, &c. R. Co.*, 2 Woods (U. S.), 506. In *Bank of Montreal v. Chicago, &c. R. Co.*, 48 Iowa, 518, an order of court appointing a receiver of a railroad company provided that he should do all things necessary to be done to complete the line of the road; that he borrow the money necessary therefor, and issue his debentures or certificates therefor; and that such certificates, "whether for money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," should be treated as receiver's indebtedness, and constitute a first lien on the road. It was held, (1) That the receiver was not authorized to issue certificates in payment of material until it had been furnished; and that certificates issued by him for material contracted for, but never delivered, were void. (2) That such certificates reciting upon their face that they were issued under an order of court, the holder was chargeable with notice of the order, and, in taking them, was bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time. A certificate of indebtedness issued by a receiver, under an order of the court appointing him to pay debts and expenses incurred by his predecessor, not on account of any indebtedness made by the former receiver or for which the receiver

issuing it received any benefit from the payee, or any one else, is not entitled to be paid out of any funds in the hands of the receiver, either at the suit of the payee or holder for value. They are wanting in nearly every essential quality of negotiable commercial paper, as they are not payable unconditionally out of any fund. Whether they are payable in full, or only *pro rata*, depends on the fact of the sufficiency of the fund under the control of the court. There is no personal liability on any one for their payment. Only the fund which the court controls is bound, and that only when it is equitable to charge it with the payment of the money evidenced thereby. Their payment can only be coerced by application to the court having control of the trust property for an order upon its acting officer. *Turner v. Peoria, &c. R. Co.*, 95 Ill. 134; 35 Am. Rep. 144. Except under extraordinary circumstances, the power of the court ought never to be exercised in enabling the trustees, where the railroad is unfinished, to borrow money by means of receivers' certificates, which create a paramount lien upon the property, in order to complete the work. *Shaw v. Little Rock &c. R. Co.*, 100 U. S. 605; *Stanton v. Alabama, &c. R. Co.*, 2 Woods (U. S.), 506.

² *McCurdy v. Bowes*, 88 Ind. 533.

³ *Bank of Montreal v. Chicago, &c. R. Co.*, 48 Iowa, 518; *Turner v. Peoria, &c. R. Co.*, 95 Ill. 134; 35 Am. Rep. 144; *Union Trust Co. v. Chicago, &c. R. Co.*, 7 Fed. Rep. 513.

⁴ It should be observed that there is a distinction between a "removal" and a "discharge" of a receiver. The receiver is "removed" for incompetency or other

receiver is the agent of the court in the administration of the trust, its power to remove him is unquestioned, and is implied from the power to appoint,¹ it rests in the discretion of the court,² and will be exercised for any irregularity or mal-administration of his duties which is brought to the attention of the court, even in an irregular manner.³ The general doctrine is that only the court making the appointment has any power to remove,⁴ but this rule has been much modified in this country, partly by statute and partly owing to the conflict arising between the jurisdiction of the State and Federal courts.⁵ The receiver is properly removed for any breach of his official duty,⁶ or for incompetency, or where his private interests conflict with the proper discharge of his official duties,⁷ or where, for any reason, the best interests of the company and its stock and bond holders demand it.⁸

In any event, a receiver will be discharged when the debt has been discharged to secure the payment of which he was appointed, or when it appears that the security of the creditor no longer requires his retention.⁹ An order discharging a receiver is not appealable,

sufficient cause, when it appears that the interests of the parties concerned will be best subserved by having another person as receiver. The receiver is "discharged" when the purposes for which he was appointed have been attained. A removal therefore only affects the person of the receiver, while a discharge terminates the receivership itself. See *Foster's Federal Practice*, § 260.

¹ *Cincinnati, &c. R. Co. v. Sloan*, 31 Ohio St. 1.

² *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217; *Crawford v. Ross*, 39 Ga. 44; *Siney v. New York Stage Co.*, 18 Abb. Pr. (N. Y.) 435; 28 How. Pr. 481. See *Milwaukee, &c. R. Co. v. Soutter*, 2 Wall. (U. S.) 521, where the court recognized this principle, but held that the particular case under consideration did not admit of its application because the facts admitted of but one course. If the receiver's private interests in any way conflict with the management of the receivership, he may be removed. *Fripp v. Chard Ry. Co.*, 11 Hare, 260; 22 L. J. Ch. 1084.

³ *Coe v. N. J. Midland R. Co.*, 27 N. J. Eq. 37.

⁴ *Young v. Montgomery, &c. R. Co.*, 2 Woods (U. S.), 619.

⁵ *Texas, &c. R. Co. v. Rust*, 17 Fed. Rep. 275; *Mahoney Min. Co. v. Bennett*, 4 Sawy. (U. S.) 289; *Hinckley v. Gilman, &c. R. Co.*, 100 U. S. 153; *Atkins v. Wabash, &c. R. Co.*, 29 Fed. Rep. 161.

⁶ As where he makes unjust discriminations in his treatment of rival shippers. *Handy v. Cleveland, &c. R. Co.*, 31 Fed. Rep. 689; *Cutting v. Florida Ry. & Nav. Co.*, 43 Fed. Rep. 747; *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 31 Fed. Rep. 862. Or where he is guilty of fraud, or his appointment was secured by misrepresentation. *Beers v. Wabash, &c. R. Co.*, 29 Fed. Rep. 161. See also *Keeler v. Brooklyn Elevated R. Co.*, 9 Abb. N. Cas. (N. Y.) 166; *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217; *United States v. Church (Utah)*, 21 Pac. Rep. 503.

⁷ *Fripp v. The Chard Ry. Co.*, 11 Hare, 260; 22 L. J. Ch. 1084.

⁸ As where there is a disagreement of joint receivers. *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 476. See also *Gibbes v. Greenville, &c. R. Co.*, 15 S. C. 518; 9 Am. & Eng. R. Cas. 723; *State v. Jacksonville, &c. R. Co.*, 15 Fla. 270.

⁹ *Howard v. La Crosse, &c. R. Co.*, 1 Woolw. (U. S.) 49; *Young v. Rollins*, 90

as the matter rests in the discretion of the court.¹ No action can be maintained against the receiver of a railroad after such officer has been discharged and the property transferred to a purchaser under an order of the court in foreclosure proceedings. Such purchaser, however, takes the property subject to all claims against the receiver, when the court has reserved its jurisdiction, upon final decree, to enforce as liens upon the property all liabilities incurred by such receiver.² Where a receiver is discharged, while an action is pending against him for personal injuries occasioned by the running of the train, and the road was sold subject to the receiver's indebtedness it was held that a judgment obtained could be enforced against the property.³

SEC. 485. Accounting and Compensation of Receiver. — The receiver is required to report to the court from time to time, as to his administration of the trust according to the terms of the order appointing him; or at such times as the court may direct, and before his final discharge, he must make a report embracing an account of

N. C. 125; 25 Am. & Eng. R. Cas. 646; *Ferry v. Bank*, 15 How. Pr. (N. Y.) 445. The receiver should be discharged at the earliest possible date consistent with the proper interests of creditors and stockholders. *Sewell v. Cape May, &c. R. Co.* (N. J.), 30 Am. & Eng. R. Cas. 155. A court of equity will never take charge of and conduct the business of a company unless the interests of stockholders and creditors clearly demand it, and where the appointment of a receiver has been secured for improper purposes, or on insufficient grounds, it will be revoked and the receivership terminated. *Sage v. Memphis, &c. R. Co.*, 18 Fed. Rep. 571; 17 Am. & Eng. R. Cas. 539; *Brassey v. New York, &c. R. Co.*, 19 Fed. Rep. 663; 17 Am. & Eng. R. Cas. 285; *Milwaukee, &c. R. Co. v. Soutter*, 2 Wall. (U. S.) 523; *Allen v. Dallas, &c. R. Co.*, 3 Woods (U. S.), 316; *Howard v. La Crosse, &c. R. Co.*, 1 Woolw. (U. S.) 49; *McHenry v. New York, &c. R. Co.*, 25 Fed. Rep. 114; *Langdon v. Vermont, &c. R. Co.*, 53 Vt. 228; 4 Am. & Eng. R. Cas. 33.

¹ *Colgate v. Michigan, &c. R. Co.*, 28 Mich. 288; *Milwaukee, &c. R. Co. v. Soutter*, 2 Wall. (U. S.) 510; *Washington, &c. R. Co. v. Southern Maryland R. Co.*, 35 Md. 153.

² *Farmers' L. & T. Co. v. Central R. Co.*, 7 Fed. Rep. 537.

In *Abbott v. Jewett, Receiver*, 25 Hun (N. Y.), 603, the plaintiff brought an action in March, 1880, against the defendant as receiver of the Erie R. Co., to recover for services rendered to him from December 1, 1875 to January 31, 1877. More than sixty days prior to the commencement of the action all the property and franchises of the old company had been sold, and the purchasers had, pursuant to Chapter 430 of the Acts of 1874, formed a new corporation, and the defendant had been discharged from his receivership. By these facts the plaintiff was under the statute prevented from maintaining the action against the receiver, but the new company was thereby subjected to the same liability as had formerly existed against him. It was held that it was proper to allow the plaintiff to amend the summons and complaint by striking out the name of the defendant and substituting that of the new corporation, although issues had been joined in the action and sent to a referee for trial; and that, as the reference had been ordered by consent, that order should be vacated.

³ *Schmid v. N. Y. & Lake Erie R. Co.*, 32 Hun (N. Y.), 335.

all his receipts and disbursements in the management of the property, and his accounts are generally referred to a master, upon whose report, unless errors have been committed by him, the receiver will be discharged, upon paying over such balance as may be in his hands as directed by the court, and turning over the property to the parties entitled to receive it under the order of the court. He is entitled to compensation in proportion to the magnitude of the trust, and the nature of the responsibilities assumed and duties discharged by him, and the manner in which he discharged them, and such an allowance will be made to him as is fair and reasonable in view of these circumstances.¹ It is evident that no fixed standard can be adopted as to compensation, as the duties and responsibilities vary in each case. A receiver of a short line of railway, whose management is simple, would not be entitled to as much compensation as the receiver of a railway whose line is long, and system complex, demanding constant care and vigilant attention; and in every case this circumstance, as well as the others referred to, will be regarded, and the compensation awarded measured accordingly.² In some instances the salary of the president of the road has been fixed upon as a proper measure of the receiver's compensation,³ though in view of the fact that the receiver generally takes charge of the road when it is in a disorganized and disordered state, and at a time when ability, tact, and constant labor are required, it seems that he may very properly be allowed a higher compensation.⁴

¹ *Jones v. Keen*, 115 Mass. 170; *Cowdrey v. Galveston, &c. R. Co.*, 1 Woods (U. S.), 331; *McArthur v. Montclair R. Co.*, 27 N. J. Eq. 77. Where the receiver agrees to act for a fixed sum, before entering upon his duties, he will be held to his agreement though the duties prove much more arduous than he had anticipated. *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary (U. S.), 318.

² See *Easton v. Houston, &c. R. Co.*, 40 Fed. Rep. 189; *Central Trust Co. v. Wabash, &c. R. Co.*, 32 Fed. Rep. 187; 20 Am. & Eng. Ency. Law, pp. 168-178, 439. See also *U. S. Trust Co. v. New*

York, &c. R. Co., 101 N. Y. 485; 25 Am. & Eng. R. Cas. 601; *Price v. White*, 1 Bailey Eq. (S. C.) 240.

³ *Mallory v. Brown*, 12 Heisk. (Tenn.) 597.

⁴ *Cowdrey v. Galveston, &c. R. Co.*, 1 Woods (U. S.), 331. The receiver's duties are prescribed, and he is not bound to work beyond them, therefore if he undertakes extra work in order to save expenses, as, for example, he appears as attorney, or assumes the duties of the superintendent, he is entitled to extra compensation to a reasonable extent. *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary (U. S.), 318.

CHAPTER XXXI.

CONSOLIDATION : LEASES.

SEC. 486. Two Roads can be Consolidated, when : Effect of.	SEC. 488. Effect of Consolidation upon Subscriptions to Stock.
487. Effect of Consolidation upon Jurisdiction of different States.	489. Power to Lease.
	490. Effect of a Lease.

SEC. 486. **Two Roads can be Consolidated, when : Effect of.** — Unless legislative authority to do so is given in the charter, or by general or special statute, a railway company has no power to consolidate its railway and franchises with another.¹ If the power to consolidate with other roads is withheld, it is regarded as a prohibition against the exercise of it. But the legislature may confer this authority either in the charter or by statute, and when acted upon, the two corporations become united in interest and capacity, and form one single corporation.² And a consolidation effected between several companies by the shareholders of each, though invalid because made without authority, is validated by legislative recognition and approval.³ The power to consolidate, when exercised, is regarded as a new charter,⁴ and generally the old corporations are dissolved, and

¹ *State v. Bailey*, 16 Ind. 46; *Aspinwall v. Ohio, &c. R. Co.*, 20 Ind. 492; *Bishop v. Brainerd*, 28 Conn. 289; *State v. Maine Central R. Co.*, 66 Me. 488; *Pearce v. Madison, &c. R. Co.*, 21 How. (U. S.) 442. In some jurisdictions there are positive prohibitions against the consolidation of companies owning parallel or competing lines of road. *Manchester, &c. R. Co. v. Concord R. Co. (N. H.)*, 20 Atl. Rep. 383.

² *State v. Maine Central R. Co.*, 66 Me. 488; *Com. v. Atlantic, &c. R. Co.*, 53 Penn. St. 9; *Phila., &c. R. Co. v. Maryland*, 10 How. (U. S.) 376; *Meyer v. Johnston*, 64 Ala. 653; 53 Ala. 237; *Paine v. Lake Erie, &c. R. Co.*, 31 Ind. 283; *State v. Sherman*, 22 Ohio St. 411;

McMahon v. Morrison, 16 Ind. 172; *Indianapolis, &c. R. Co. v. Jones*, 29 Ind. 465; *Boston, &c. R. Co. v. Midland R. Co.*, 1 Gray (Mass.), 346; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

³ *United States v. Southern Pac. R. Co.*, 45 Fed. Rep. 596; 14 Sawy. (U. S.) 620; *Bishop v. Brainerd*, 28 Conn. 289; *Mead v. New York, &c. R. Co.*, 45 Conn. 199. But invalidity arising from the failure to secure the consent of stockholders, is beyond legislative recognition.

⁴ *State v. Maine Central R. Co.*, 66 Me. 488. A consolidation of two companies and the creation of a single capital stock by combining the stock of the two companies does not create a new corporation within the meaning of a statute requir-

their franchises are conferred upon the new company;¹ and unless the statute or articles of consolidation make express provision therefor, the new corporation assumes all the liabilities of the old ones,² at least in equity, to the extent of the property received by it from the old corporation, and it is also liable at law.³ An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation. Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come.⁴ A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement.⁵ Where two or more railroad companies are consolidated, as far as creditors of one of the original companies are concerned, the consolidated company is successor of the old company; but in respect to the properties of the other companies, it is a new and independent company; and such creditors have no claim against it upon the original contracts, but only by virtue of its assumptions of the obligations of the old companies.⁶ It takes the property subject to the debts and

ing newly formed corporations to pay a certain premium to the State upon their organization. *People v. New York, &c. R. Co.*, 129 N. Y. 474, 654, *reversing* 15 N. Y. Supp. 545. Compare *People v. Cook*, 110 N. Y. 443. See also *Trester v. Missouri Pac. R. Co.* 33 Neb. 171; 49 N. W. 1110, holding that a recordation of the articles of the consolidated company is unnecessary, though it is required where a new corporation is organized.

¹ *Meyer v. Johnston*, 53 Ala. 237; *Clearwater v. Meredith*, 1 Wall. (U. S.) 25; *Miller v. Lancaster*, 5 Cold. (Tenn.) 514; *Eaton, &c. R. Co. v. Hunt*, 20 Ind. 457; *Columbus, &c. R. Co. v. Powell*, 40 Ind. 37; *Indianapolis, &c. R. Co. v. Jones*, 29 Ind. 465. Whether they are dissolved or not depends upon the intent of the legislature manifested by the act authorizing it. *Central R. Co. v. Georgia*, 92 U. S.

665; *Booe v. Junction R. Co.*, 10 Ind. 98.

² *Miller v. Lancaster*, 5 Cold. (Tenn.) 514; *Harrison v. Union Pacific R. Co.*, 13 Fed. Rep. 522; *Caley v. Coburg, &c. Ry. Co.*, 14 Grant's Ch. (U. C.) 531; *Tysen v. Wabash R. Co.*, 11 Biss. (U. S.) 510; 15 Fed. Rep. 563; *Columbus, &c. R. Co. v. Powell*, 40 Ind. 37.

³ *Harrison v. Arkansas, &c. R. Co.*, 4 McCrary (U. S.), 264.

⁴ *Powell v. North Missouri R. Co.*, 42 Mo. 63.

⁵ *Paine v. Lake Erie, &c. R. Co.*, 31 Ind. 283. See also *Fitzgerald v. Missouri, Pacific, &c. R. Co.*, 45 Fed. Rep. 812 (contracts made by the consolidated company binding on all the component companies in other States).

⁶ *Prouty v. Lake Shore, &c. R. Co.*, 52 N. Y. 363. It is clear that a corporation

liabilities of the original companies, and burdened with all liens upon it which were valid against those companies, and will not be permitted to aver ignorance of an unrecorded mortgage previously executed by one of the original companies ;¹ and where the company thus formed assumes a new name, the company may be sued by the new name thus assumed, and it will be estopped from denying the name by which it is sued.² Indeed, after one railroad company has consolidated with another as allowed by their respective charters, and authorized and confirmed by legislative acts conferring all rights, powers, and privileges belonging to either on the new company thus formed, all liabilities of either can thenceforward only be enforced against and in the name of the consolidated company.³ But this rule is restricted to voluntary consolidations, as the foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest on agreement, either express or implied.⁴ A statute which provides that, in case of the consolida-

cannot discharge its liabilities by transferring them to another company ; and the creditors of a company cannot be compelled by law to accept the liability of a new company formed by the stockholders of several companies, in substitution of their original rights. 2 Morawetz on Priv. Corp. (2d ed.), §§ 808, 954. This author then goes on to say, after stating this principle (§ 954): "It does not follow, however, that corporations cannot be consolidated without the consent of their creditors. The dissolution of a corporation by the surrender of its charter does not destroy the claims of creditors. Their remedy *at law* is, indeed, lost in such a case, unless otherwise provided by statute ; but the assets of the corporation remain a trust fund for the payment of its debts. A consolidation involves the dissolution of the consolidating companies and the formation of a new and enlarged corporation out of the stockholders of the old companies with their combined capital. Neither of these transactions can be prevented by creditors, inasmuch as their rights are not thereby invaded. The legal liability of the consolidated company would be substituted in the place of that of each of the original companies to its creditors, and the creditors of each of these companies would retain their equitable right to the security fur-

nished by the assets of the company for which they dealt." See also *Spence v. Mobile & M. R. Co.*, 79 Ala. 576 ; *Columbus, &c. R. Co. v. Skidmore*, 69 Ill. 566 ; *Western Union R. Co. v. Smith*, 79 Ill. 496. The lien of a mortgage on the property of a railroad company remains unaffected by consolidation. *Eaton, &c. R. Co. v. Hunt*, 20 Ind. 457 ; *Mississippi Valley R. Co. v. Chicago, &c. R. Co.*, 58 Miss. 846 ; *Racine, &c. R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331. See also *The Key City*, 14 Wall. (U. S.) 654. And it covers all acquisitions of the consolidated company which become a part of the estate to which it originally attached. *Hamlin, &c. R. Co. v. Jerrard*, 72 Mo. 62 ; *Railroad Co. v. Georgia*, 92 U. S. 665 ; 98 U. S. 359. Mortgages of the consolidated company have priority over unsecured creditors of the original companies. *Wabash, &c. R. Co. v. Ham*, 114 U. S. 587 ; *Blair v. St. Louis, &c. R. Co.*, 24 Fed. Rep. 148.

¹ *Mississippi Valley Co. v. Chicago, &c. R. Co.*, 58 Miss. 846.

² *Columbus, &c. R. Co. v. Skidmore*, 69 Ill. 566.

³ *Indianola R. Co. v. Fryer*, 56 Tex. 609.

⁴ *Houston, &c. R. Co. v. Shirley*, 54 Tex. 125.

tion of two or more railroad companies, the consolidated company shall be liable for all debts of each company entering into the arrangement, is not retrospective, but is designed to apply to companies which might consolidate after its passage.¹ The result of consolidation under a statute is that the statute becomes part of the contract of consolidation; the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. The consolidated company is substituted for them. Unsecured debts of the latter remain unsecured debts of the former. The consolidated company may execute a mortgage upon all of the consolidated property which would be paramount to the unsecured debts of the constituent companies.² The liability of the consolidated company extends to personal injuries committed by either of its components.³

Where an act of the legislature, consolidating two railroad companies into one under a new name, provided that the consolidation and change of name "shall in no way affect the rights of the creditors of said companies, and their separate existence shall be continued as to all the rights and remedies of creditors;" and that the president of the new company "shall be held in law, as to service of process, as the president of" each of the old companies; and that the new company "may dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same, and sue for and recover in its name all debts, dues, and demands, of every kind and description whatsoever, due to each of said companies," — it was held that an action at law might be maintained against the new company, to recover damages for personal injuries

¹ *Hatcher v. Toledo, &c. R. Co.*, 62 Ill. 477.

² *Tyssen v. Wabash R. Co.*, 15 Fed. Rep. 763.

³ *Whipple v. Union Pacific R. Co.*, 28 Kan. 474. In this case it appeared that in August, 1879, the Kansas Pacific R. Co. owned and operated a line of railway through the city of L., and while operating its railroad one of its trains injured the plaintiff. In January, 1880, the Kansas Pacific R. Co., the Denver Pacific R. Co., and the Union Pacific R. Co. entered into an agreement of consolidation, by which agreement they formed, or attempted to form, the Union Pacific R. Co., and to such company, by the articles of consolidation, transferred all their respective properties. The articles of consolidation

expressly stipulated that the consolidated company should not be liable for the individual debts of the constituent companies, but that such constituent companies should continue in existence for the purpose of adjusting all claims and demands; and also that the consolidation should not prevent the enforcement of any valid obligation or liability of either constituent company against the properties so transferred by such constituent company. It was held that before the plaintiff could maintain an action against the consolidated company, he must, by an action against the Kansas Pacific R. Co., the party which did the injuries, convert his unliquidated claim into a liquidated demand, and have both the fact and the amount of that company's liability adjudicated.

caused by the wrongful act of one of the old companies.¹ Where two or more railway companies are consolidated, and the new company assumes the debts and obligations of the original companies, the directors or other officers of the new organization are not necessary or proper parties to an action brought by a holder of preferred and guarantied stock of one of the old companies to enforce an alleged contract made by it to pay specified dividends upon said stock.² So the new company is answerable for the torts of the old companies. Thus, a petition by a guardian alleged that his wards were owners in fee-simple of a certain woodland; that the timber thereon was cut down and removed by a person unknown, and without any authority whatever, and that the same was taken, used, and possessed for its own use, and without any authority whatever, by a certain railroad company, which company was afterwards consolidated with another railroad company, etc. It was held on demurrer that the petition stated sufficient facts to constitute a cause of action for the conversion of personal property as against the consolidated company.³ A corporation becoming consolidated with another, and changing its name while a suit is pending against it, is not so dissolved, nor its original liability so extinguished, that the pending suit abates;⁴ and the plaintiff has a right to treat it as having a separate existence for the prosecution of his action against it. The action of the legislature authorizing, and the corporation in acting under such authorization, cannot defeat or prejudice the right of a plaintiff in suits pending against it. As to such the corporation exists for the purpose of judgment; as to them it has not lost its individuality or identity. The act of the corporation cannot defeat the rights of persons holding claims against it.⁵ A judgment against a consolidated company may be executed against the respective companies, although they have been dissolved by judicial action.⁶ Persons who purchase bonds of a railway company while a statute is in force authorizing the consolidation of railways must be held to have contemplated, at the time of the purchase of the bonds, that the company issuing them might

¹ *Warren v. Mobile & Montgomery R. Co.*, 49 Ala. 582.

² *Chase v. Vanderbilt*, 62 N. Y. 307.

³ *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *Stephenson v. Texas, &c. R. Co.*, 42 Tex. 162; *Coggin v. Central R. Co.*, 62 Ga. 685; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; *Texas, &c.*

R. Co. v. Murphy, 46 Tex. 356; *Chicago, &c. R. Co. v. Moffett*, 75 Ill. 124.

⁴ *East Tenn., &c. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

⁵ *Shackleford v. Mississippi Central R. Co.*, 52 Miss. 159; *ante*, note 6, p. 2044.

⁶ *Ketcham v. Madison, &c. R. Co.*, 20 Ind. 260.

consolidate with other companies.¹ A mortgage outstanding upon one railroad at the time when a consolidation is effected remains a valid security thereon; and the same is true as to all liens which have attached thereto.²

SEC. 487. Effect of Consolidation upon Jurisdiction of Different States. — Where railway companies in different States are consolidated, the several States still retain jurisdiction over that portion of the road lying in each, and each is subject to the legislation of the State in which it lies,³ however diverse such legislation may

¹ *Tysen v. Wabash R. Co.*, 15 Fed. Rep. 763.

² *Ritter v. Union Pacific R. Co.*, 12 Am. & Eng. R. Cas. 374; *Hazard v. Vt. & Canada R. Co.*, 17 Fed. Rep. 753. There is no constitutional objection to the co-operation of several States in authorizing the consolidation of companies chartered by each respectively. *Wilmer v. Atlanta, &c. R. Co.*, 2 Woods (U. S.), 417; *Boardman v. Lake Shore, &c. R. Co.*, 84 N. Y. 157; *Ohio, &c. R. Co. v. Weber*, 96 Ill. 443; *Railroad Co. v. Maine*, 96 U. S. 499. In *Brockett v. Ohio, &c. R. Co.*, 14 Penn. St. 224, and *Cleveland, &c. R. Co. v. Speer*, 56 Penn. St. 325, it has been intimated that where several States unite in incorporating the same company, a contract arises between the several States as well as between each State and the company. But this is very doubtful. See 2 Morawetz on Priv. Corp. (2d ed.) § 997.

³ *Eaton, &c. R. Co. v. Hunt*, 20 Ind. 457. Where a railroad corporation was made up of four distinct corporations, chartered by the legislatures of different States, and all consolidated and merged into one corporation under the laws of such States, and becomes one of that class of corporations owning a railroad extending through two or more States and chartered under the laws of each State, having a common stock, the same shareholders and officers, the same property, and a single organization, it is for most purposes one corporation. But it is a separate corporation in each State, in so far that it is governed by the laws of each within its own territory, and is considered to have a domicile in each State; and, in the absence of any statutory provision to the contrary, may hold its meetings and trans-

act its corporate business in either State. *Graham v. Boston, &c. R. Co.*, 14 Fed. Rep. 753. Several States may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one State may, without thereby creating a new corporation, authorize a corporation of another State to carry on business within its territory. *Copeland v. Memphis, &c. R. Co.*, 3 Woods (U. S.), 651. Where a new corporation is formed by amalgamation, under the authority of the State, of two or more distinct corporations into one, it succeeds to all the rights of the several components, and is subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected. *Chicago, &c. R. Co. v. Moffitt*, 75 Ill. 524. After consolidation the new company becomes liable to perform the duties required of the railroad companies so consolidated; and if no part of the franchise is reserved to either of the old companies, they will not be liable to the public for the performance of duties devolving upon the new companies. *Peoria, &c. R. Co. v. Coal Valley Mining Co.*, 68 Ill. 489. A new corporation may be created by the union of two or more corporations, and its powers and privileges designated by reference to the charters of other companies, as well as by special enumeration. *Railroad Co. v. Maine*, 96 U. S. 499. The legislature may incorporate a new and distinct corporation out of two or more previously existing corporations. And where a new corporation is thus formed, and by the act is to "have the powers, privileges, and immunities possessed by each of the corporations"

be.¹ The consolidated company is considered as being a distinct corporation in each State,² with all the privileges and obligations attaching by the law of that State to the old company.³ Rights vested in the respective corporations pass to and vest in the new corporation, and these, of course, the legislature of none of the States can impair. Therefore, where by the terms of the charter, one of the corporations was exempt from taxation, unless the removal of this exemption was made a condition of its right to consolidate, the exemption vests in the new corporation.⁴

whose union constitutes such new corporation, the new corporation will have only the privileges, powers, and immunities which the corporation with the fewest privileges, powers, and immunities possessed, and which were common to all. This rule applies to exemption from taxation. *State v. Maine Central R. Co.*, 66 Me. 488. All statutory conditions must be complied with, and if an election of a board of directors of the consolidated corporation is by the statute clearly made a condition precedent to its acquiring the rights and franchises of the original corporations, or if the filing of a duplicate of the consolidation agreement in the office of the Secretary of State, after being duly made and submitted to the stockholders and confirmed by them, is by the statute made a condition precedent to a merger of the original corporations, there can be no valid action as a consolidated corporation until that is done; and any attempted election of directors of the consolidated corporation before that is without warrant and ineffectual. *Mansfield, &c. R. Co. v. Drinker*, 30 Mich. 124. If a member of a board of directors of a corporation be present at the adoption of a resolution, and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the

consolidation. *Mowrey v. Indianapolis, &c. R. Co.*, 4 Biss. (U. S.) 78.

¹ *Covington v. Bridge Co.*, 10 Bush (Ky.), 69. It may be dissolved and wound up in one State without its franchise in the other being affected. *Hart v. Boston, &c. R. Co.*, 40 Conn. 524.

² *Racine, &c. R. Co. v. Trust*, 49 Ill. 331; *Ohio, &c. R. Co. v. Wheeler*, 1 Black (U. S.), 297; *ante*, §§ 14, 14 a.

³ *Cashman v. Brownlee*, 128 Ind. 466; *Polhemus v. Fitchburg R. Co.*, 123 N. Y. 502; *Cooper v. Corbin*, 105 Ill. 224; *Shields v. Ohio, &c. R. Co.*, 95 U. S. 319; *Peoria, &c. R. Co. v. Mining Co.*, 68 Ill. 489; *Pullman Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 587. *Compare St. Louis, &c. R. Co. v. Berry*, 113 U. S. 465, 475. In that case it appeared that the charter of the Cairo & Fulton R. Co. authorized it to consolidate with other companies. It also contained a provision exempting the company's road franchises and other property from taxation. After granting this charter, the State adopted a constitution which contained a provision that all incorporation laws passed thereafter should be subject to a reserved power of alteration or repeal; also that "the property of corporations now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals." After the adoption of the constitution the company was consolidated with another company, and it was claimed that the consolidated company was entitled to the exemption from taxation belonging to the Cairo & Fulton Company. The court held, however, that the consolidated company did not acquire the exemption. See 2 Morawetz on Priv. Corp. (2d ed.), § 948.

⁴ *State v. Com'r of Railroad Taxation*,

SEC. 488. Effect of Consolidation upon Subscriptions to Stock. —

If two or more railway companies consolidate before the subscriptions to the stock thereof have been paid, under authority obtained subsequent to the subscriptions, or if by the consolidation the object and purposes of the original enterprise are radically changed, it is held that such subscriptions to the stock, whether by municipal corporations, or individuals, are thereby discharged,¹ unless such subscribers have acquiesced in the change. But a municipal corporation has no power to acquiesce in a radical change in the original plan which so far changes the enterprise that the vote in favor of the subscription does not apply to the new enterprise.² This rule, however, does not apply where authority to consolidate existed when the subscription was made or the vote was taken.³ The stockholders of the respective roads are not *ipso facto* in the new corporation, but only have a right to become so by surrendering their old stock for the new; but their property interest remains unchanged until the exchange is made,⁴ and the company cannot divest them of this interest. These questions have been more fully discussed in previous chapters.⁵

SEC. 489. Authority to Lease. — A railroad company is a *quasi* public corporation, and as such enjoys peculiar privileges and is vested with unusual powers; its obligations are correspondingly great, and it cannot, by contract or otherwise, evade these obligations nor disable itself to discharge them;⁶ moreover a great and essential part of its property is generally acquired by the exercise of the power of eminent domain, and the legislature in granting this power contemplates that the property so acquired shall be for the use of the company in the enterprise for which its charter provides, and not for purposes of sale or transfer.⁷ For these and other reasons the

37 N. J. L. 243; Philadelphia, &c. R. Co. v. Maryland, 10 How. (U. S.) 376; Chesapeake, &c. R. Co. v. Virginia, 94 U. S. 718; Delaware R.-Co. v. Cox, 18 Wall. (U. S.) 206; Branch v. Charleston, 92 U. S. 677. See *ante*, n. 3, p. 2049.

¹ Martin v. Junction R. Co., 12 Ind. 605; Harshman v. Bates County, 92 U. S. 569; McCray v. Junction R. Co., 9 Ind. 358.

² Clearwater v. Meredith, 1 Wall. (U. S.) 40; State v. Com'rs of Nehama County, 10 Kan. 569; McMahan v. Morrison, 16 Ind. 172.

³ Mansfield, &c. R. Co. v. Brown, 26 Ohio St. 223; Sparrow v. Evansville, &c. R. Co., 7 Ind. 369.

⁴ McCray v. Junction R. Co., 9 Ind. 358; Philadelphia, &c. R. Co. v. Catawissa R. Co., 53 Penn. St. 20.

⁵ See *ante*, §§ 35-36, 58, 123.

⁶ Briscoe v. Southern Kansas R. Co., 40 Fed. Rep. 273; 40 Am. & Eng. R. Cas. 599; Wabash, &c. R. Co. v. Peyton, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1; Norwich, &c. R. Co. v. Worcester, 147 Mass. 518; 36 Am. & Eng. R. Cas. 447; Hamilton v. Savannah, &c. R. Co., 49 Fed. Rep. 412; Thomas v. West Jersey R. Co., 101 U. S. 71 (such a lease would be a violation of the company's contract with the State).

⁷ See 2 Morawetz on Priv. Corp. (2d ed.) §§ 620, 1120, n. 1; *ante*, §§ 194, 225.

policy of the law forbids the lease of the road and franchises of one railroad company to another, and such a lease, *unless made in pursuance of a clear and express grant of authority*, is absolutely void. This principle has long been recognized, and is upheld in every court in the country.¹ "When a railroad company accepts a charter it assumes the performance of all duties to the public which are im-

¹ Thomas v. West Jersey R. Co., 101 U. S. 71; York, &c. Line R. Co. v. Winans, 17 How. (U. S.) 30; Washington, &c. R. Co. v. Brown, 17 Wall. (U. S.) 450; Pennsylvania R. Co. v. St. Louis, &c. R. Co., 118 U. S. 293; 24 Am. & Eng. R. Cas. 58; Oregon, &c. R. Co. v. Oregonian Ry. Co., 130 U. S. 1; 39 Am. & Eng. R. Cas. 176; 145 U. S. 52; Atlantic, &c. R. Co. v. Union Pac. R. Co., 1 Fed. Rep. 745; Pullan v. Cincinnati, &c. R. Co., 4 Biss. (U. S.) 35; Memphis, &c. R. Co. v. Grayson, 88 Ala. 572; 43 Am. & Eng. R. Cas. 681; Hays v. Ottawa, &c. R. Co., 61 Ill. 422; Tippecanoe Co. v. Lafayette, &c. R. Co., 50 Ind. 85; Middlesex R. Co. v. Boston, &c. R. Co., 115 Mass. 347; Com. v. Smith, 10 Allen (Mass.), 448; State v. Atchison, &c. R. Co., 24 Neb. 143; 32 Am. & Eng. R. Cas. 388, n.; Mills v. Central R. Co., 41 N. J. Eq. 1; 24 Am. & Eng. R. Cas. 47; Black v. Delaware, &c. Canal Co., 24 N. J. Eq. 455; Troy, &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Abbott v. Johnstown Horse R. Co., 80 N. Y. 27; 36 Am. Rep. 572; 2 Am. & Eng. R. Cas. 541; Troy, &c. R. Co. v. Boston, &c. R. Co., 86 N. Y. 107; 7 Am. & Eng. R. Cas. 49; Woodruff v. Erie R. Co., 93 N. Y. 609; 16 Am. & Eng. R. Cas. 501, 512, n.; Stewart's Appeal, 56 Penn. St. 413; Pittsburgh, &c. R. Co. v. Allegheny Co., 63 Penn. St. 126; Harmon v. Columbia, &c. R. Co., 28 S. C. 401; 36 Am. & Eng. R. Cas. 445; International, &c. R. Co. v. Underwood, 67 Tex. 589; 34 Am. & Eng. R. Cas. 570; Central, &c. R. Co. v. Morris, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; Beeman v. Rufford, 6 Eng. L. & Eq. 106; Great Northern Ry. Co. v. Eastern Counties Ry. Co., 12 Eng. L. & Eq. 224; 19 Am. & Eng. Ency. Law, p. 896. Compare Bardstown, &c. R. Co. v. Metcalf, 4 Met. (Ky.) 199; Shepley v. Atlantic, &c. R. Co., 55 Me. 395; State v. Ohio, &c. R. Co., 6 Ohio Cir. Ct. Rep.

415; Pittsburgh, &c. R. Co. v. Columbus, &c. R. Co., 8 Biss. (U. S.) 456. See also, as supporting the rule announced in the text, Troy, &c. R. Co. v. Boston, &c. R. Co., 86 N. Y. 107; Pittsburgh, &c. R. Co. v. Bedford, &c. R. Co., 81½ Penn. St. 104; Woodruff v. Erie R. Co., 25 Hun (N. Y.), 246; Hinckley v. Gildersleeve, 19 Graut's Ch. (U. C.) 212; Attorney-General v. Niagara Falls Bridge Co., 20 id. 34; Thomas v. Railroad Co., 101 U. S. 71; Archer v. Terre Haute, &c. R. Co., 102 Ill. 493. But in England it is held that one railway company has the right to lease its road for the use of another. Midland Ry. Co. v. Great Western Ry. Co., L. R. 8 Ch. App. 841. In many of the charters there is a provision that the company may lease its road, or the general statute so provides; and where such authority is conferred, no question can arise as to the power of the company in this respect. But where the statute imposes certain conditions, a lease made in pursuance thereof must fully comply therewith, or it will be invalid. See Peters v. Lincoln, &c. R. Co., 14 Fed. Rep. 319. In an English case, an Act of Parliament empowered one railway company to grant, and another company to accept, a lease of a railway upon such terms as should be agreed upon, provided that the power to lease should not arise until the board of trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised and applied for the purpose of their acts; and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting. It was held that no lease, or binding agreement for a lease, could be made before the certificate had been obtained. Kent Coast Ry. Co. v. London & Ry. Co., L. R. 3 Ch. App. Cas. 656.

posed by the charter or by the general law of the State, and it cannot be permitted to escape from the obligations imposed upon it by transferring its chartered rights and privileges, either to an individual or to another corporation. . . . If it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter and practically leave the public generally, as well as individuals, without any of the protection which the obligations imposed by its charter, as well as the general law of the State, were designed to afford."¹ The same principles forbid the lease, by a receiver, of a railroad over which he has charge, except upon express authority.² Nor can a company take from another company a lease of the latter's road and franchises.³

A lease without authority is not merely invalid *but is absolutely void*. This is very clearly held in a recent case in the United States Supreme Court, where in an action by the lessor for rent due under the lease, the court held that the lease being void the action could not be maintained, although the contract had become executed, and the lessee had enjoyed full use of the property for ten years.⁴

Of course the legislature has power to authorize such leases, and

¹ McIVER, J., in *Harmon v. Columbia, &c. R. Co.*, 28 S. C. 401; 36 Am. & Eng. R. Cas. 445, n. See also language of REDFIELD, C. J., in *Nelson v. Vermont, &c. R. Co.*, 26 Vt. 717. A statute will not be construed as granting authority to lease the road unless the legislative intention is clear and unquestionable. There are no presumptions in favor of a grant of such authority. *St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co.*, 145 U. S. 393. A power to consolidate does not embrace a power to lease. *Mills v. Central R. Co.*, 41 N. J. Eq. 5; *Archer v. Terre Haute, &c. R. Co.*, 102 Ill. 493.

² *State v. McMinnville, &c. R. Co.*, 6 Lea (Tenn.), 369; 4 Am. & Eng. R. Cas. 95; *Gibert v. Washington City, &c. R. Co.*, 33 Gratt. (Va.) 586; 1 Am. & Eng. R. Cas. 478. See also *McMinnville, &c. R. Co. v. Huggins*, 3 Baxt. (Tenn.) 177. But the court may authorize him to lease the road where the interests of stock and bond holders are to be best subserved in that way. *Gibert v. Washington City, &c. R. Co.*, 33 Gratt. (Va.) 586; 1 Am. & Eng.

R. Cas. 473; *Mercantile Trust Co. v. Missouri, &c. R. Co.*, 41 Fed. Rep. 8; 43 Am. & Eng. R. Cas. 469.

³ *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1; 39 Am. & Eng. R. Cas. 176; *Pennsylvania R. Co. v. St. Louis, &c. R. Co.*, 118 U. S. 290; 24 Am. & Eng. R. Cas. 58; *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

⁴ *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24; 45 Am. & Eng. R. Cas. 620, where Mr. Justice GRAY considers the question at great length. See this case reviewed, *ante*, p. 568. See the same principle applied in *Oregon R. & Nav. Co. v. Oreg. R. Co.*, 145 U. S. 52 (lessee not estopped to deny validity of lease, by payment of rental for three years). A contrary view is upheld in *Woodruff v. Erie R. Co.*, 93 N. Y. 609, and in *Farmers' L. & T. Co. v. St. Joseph, &c. R. Co.*, 2 Fed. Rep. 117. The lease being utterly void its validity is not aided by the lessor's acceptance of the rental due under it. *Ogdensburg, &c. R. Co. v. Vermont, &c. R. Co.*, 4 Hun (N. Y.), 268.

where the authority has been expressly granted and the consent of stockholders secured,¹ there can be no objection to a lease made in pursuance of it.² But an act of a State legislature granting such authority cannot authorize the lease of property beyond the State.³

SEC. 490. Effect of the Lease.—Where the lease is made in proper form and under authority from the legislature as well as from the stockholders, the lessee assumes all the duties and obligations incumbent upon the lessor as well as the rights and privileges belonging to it.⁴ This, however, does not embrace the contractual liabilities

¹ The consent of a majority of the stockholders fairly obtained is always essential to the validity of a lease. The consent must be expressed at a stockholder's meeting. *Peters v. Lincoln*, &c. R. Co., 2 McCrary (U. S.), 275; 12 Fed. Rep. 513; 6 Am. & Eng. R. Cas. 597; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 11 Daly (N. Y.), 373; 15 Am. & Eng. R. Cas. 1; 14 Abb. N. Cas. (N. Y.) 103 (in this case the question is elaborately considered, particularly in the report in *Abbotts N. Cas.*); *Farmers' L. & T. Co. v. St. Joseph*, &c. R. Co., 1 McCrary (U. S.), 247; *Humphreys v. St. Louis*, &c. R. Co., 37 Fed. Rep. 307; *Boston*, &c. R. Co. v. *Salem*, &c. R. Co., 2 Gray (Mass.), 1; *Phillips v. Eastern R. Co.*, 138 Mass. 122. Compare, however, *Beveridge v. New York El. R. Co.*, 112 N. Y. 1; 39 Am. & Eng. R. Cas. 199. Where the statute requires the stockholders' "assent in writing" in order to authorize a lease, the mere voting by written ballots upon a written proposition for the lease of the road, is not sufficient. But it seems that if the president signs a certificate that a majority have assented, it is sufficient. *Humphreys v. St. Louis*, &c. R. Co., 37 Fed. Rep. 307. A majority of the stockholders cannot authorize a lease of the road in defiance of the wishes of the minority, where it appears that the interests of the latter will be seriously prejudiced thereby. *Mills v. Central R. Co.*, 41 N. J. Eq. 1; 24 Am. & Eng. R. Cas. 47. See also *ante*, § 63; *Upson County R. Co. v. Sharman*, 37 Ga. 644. A stockholder may enjoin an unauthorized lease, but where he waits nineteen years before moving to set aside the lease as having been made without the consent of stockholders, his right to object is lost. *St.*

Louis, &c. R. Co. v. *Terre Haute*, &c. R. Co., 33 Fed. Rep. 440; *Pond v. Vermont Valley R. Co.*, 12 Blatchf. (U. S.) 280.

² *Vermont*, &c. R. Co. v. *Vermont Central R. Co.*, 50 Vt. 500; *Day v. Ogdensburg*, &c. R. Co., 107 N. Y. 129; 35 Am. & Eng. R. Cas. 102; *Central*, &c. R. Co. v. *Macon*, 43 Ga. 605; *Gratz v. Pennsylvania R. Co.*, 41 Penn. St. 447; *Philadelphia*, &c. R. Co. v. *Catawissa R. Co.*, 53 Penn. St. 20; *Branch v. Atlantic R. Co.*, 3 Woods (U. S.), 481; *Shelby R. Co. v. Louisville*, &c. R. Co., 145 U. S. 52.

³ *Briscoe v. Southern Kan. R. Co.*, 40 Fed. Rep. 273; 40 Am. & Eng. R. Cas. 599. See also *Rafferty v. Central Traction Co.* (Penn.), 23 Atl. Rep. 884. Under the Minnesota statute authorizing the lease of railroad property, it is held that the lease can only be made to a company of the State. *Freeman v. Minneapolis*, &c. R. Co., 28 Minn. 413; 7 Am. & Eng. R. Cas. 410.

⁴ *State v. Central R. Co.*, 71 Iowa, 410 (lessees bound to operate road to such towns as had extended aid to the former company); *Chicago*, &c. R. Co. v. *Crane*, 113 U. S. 424; 20 Am. & Eng. R. Cas. 600 (same); *Pennsylvania R. Co. v. Sly*, 65 Penn. St. 205; *in re New York*, &c. Co., 49 N. Y. 414; *South Carolina R. Co. v. Wilmington*, &c. R. Co., 7 S. C. 410. This embraces the duty to give the statutory signals, to keep the fences and crossings in proper repair, etc. *Linfield v. Old Colony R. Co.*, 10 Cush. (Mass.) 562; 57 Am. Dec. 124; *McCall v. Chamberlain*, 13 Wis. 637; *Cook v. Milwaukee*, &c. R. Co., 36 Wis. 45; *Curry v. Chicago*, &c. R. Co., 43 Wis. 665. But it seems that the franchise of eminent domain does not pass to the lessee but remains in the lessor. *Mayor*

of the lessor; these remain where they were unless the terms of the lease provide otherwise.¹ Nor does the lessee assume any liability for injuries inflicted by the lessor prior to the lease, unless it is expressly so provided.² But all the public obligations of the lessor are assumed by the lessee, who becomes liable for their non-performance and for all injuries resulting from a negligent operation of the road.³ The most important question in this connection is as to the relative liability of the lessor and lessee for injuries committed in the operation of the road.⁴ It appears to us that the following statement embodies the true principles governing the question:—

1. Whether the lease is valid or not, the lessee is liable for all injuries resulting from the negligent operation and maintenance of the road. If the injury is to a passenger or servant, resulting from a defective track or appliances, clearly the lessee cannot defend on the ground that the defective property belonged to another company. A carrier undertakes to carry safely, and his liability is the same whether he uses his own property or that of another.⁵ If the injury

v. Norwich, &c. R. Co., 109 Mass. 103; *Chicago, &c. R. Co. v. Illinois Central R. Co.*, 113 Ill. 156; *Englewood, &c. R. Co. v. Chicago, &c. R. Co.*, 117 Ill. 611; *Gottschalk v. Lincoln, &c. R. Co.*, 14 Neb. 389; 10 Am. & Eng. R. Cas. 118. In some cases the lessee is allowed to institute proceedings in the name of the lessor. *Dietrichs v. Lincoln, &c. R. Co.*, 13 Neb. 361. See also *Kip v. New York, &c. R. Co.*, 67 N. Y. 227.

¹ See *Chicago v. Evans*, 24 Ill. 52; *Pittsburgh, &c. R. Co. v. Keokuk, &c. Bridge Co.*, 131 U. S. 371; 39 Am. & Eng. R. Cas. 213; *Brown v. Toledo, &c. R. Co.*, 35 Fed. Rep. 444. A company which is in debt cannot transfer its entire property by lease so as to prevent the application of it at its full value to the satisfaction of the debts of the company, and when such a transfer is made an equity court may decree the payment of a judgment-debt of the lessor by the lessee. *Chicago, &c. R. Co. v. Third Nat. Bank*, 26 Fed. Rep. 820; 134 U. S. 276; *Central R. Co. v. Pettus*, 113 U. S. 116; 43 Am. & Eng. R. Cas. 688. See also 19 Am. & Eng. Ency. Law, pp. 897 *et seq.*

² *Pittsburgh, &c. R. Co. v. Kain*, 35 Ind. 291.

³ *State v. Central Iowa R. Co.*, 71 Iowa,

410; *Buffalo Stone Co. v. Delaware, &c. R. Co.*, 130 N. Y. 152; *Linfield v. Old Colony R. Co.*, 10 Cush. (Mass.) 562; 57 Am. Dec. 124; *supra*, p. 2024, *n.* 4. See in this connection as to the rights and liabilities of two companies united under a lease, *March v. Eastern R. Co.*, 43 N. H. 515; 40 N. H. 548; 77 Am. Dec. 732. Thus the lessee is bound by limitations imposed by law upon the lessor as to the rates it may charge for transportation. *McGregor v. Erie R. Co.*, 36 N. J. Eq. 89. It is equally entitled to the privileges of the lessor. Thus, the New York Central Company having by a contract, which was construed to be a lease, run and operated the railway of another company, it was held that it had the right to charge such rates as were legal for the company owning the leased line. *Fisher v. N. Y. Central R. Co.*, 46 N. Y. 644. A corporation of one State, operating a road in another State as lessee, is subject, as to that road, to such local legislation as would have been applicable to the lessor, had the lease not been made. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 347; 23 Am. & Eng. R. Cas. 577.

⁴ See this question discussed at some length in 19 Am. & Eng. Ency. Law, pp. 899-903.

⁵ *Wabash, &c. R. Co. v. Peyton*, 106

occurs to any one in consequences of the negligent operation of the train, the fact that the road is leased is immaterial; the servants are those of the lessee, he selects them, and has full control over them, and must be held liable for all their wrongful acts within the scope of their employment. Upon these grounds the authorities are practically unanimous in holding the lessee liable for all injuries resulting from the improper and negligent maintenance and operation of the road.¹

2. Where the lease is made without clear and specific authority it is, as we have seen, utterly void because public policy very strongly opposes any attempt on the part of a company to relieve itself of its high obligations by transferring them to another company, and where this is the case the liability of the lessor is entirely

Ill. 534; 18 Am. & Eng. R. Cas. 1; *Mahoney v. Atlantic, &c. R. Co.*, 63 Me. 68; *McCluer v. Manchester, &c. R. Co.*, 13 Gray (Mass.), 124; 74 Am. Dec. 624; *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Burroughs v. Norwich, &c. R. Co.*, 100 Mass. 26; *Patterson v. Wabash, &c. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; *Murch v. Concord R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *Philadelphia, &c. R. Co. v. Anderson*, 94 Penn. St. 351; 6 Am. & Eng. R. Cas. 407. In the case of *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424, REDFIELD, C. J., speaking for the court, said: "It is well settled in practice, and by repeated decisions, that the lessees of railroads are liable to the same extent as the lessors would have been, while they continue to operate the road. Indeed, there can be no question, we think, that a mere intruder into the franchises of a railroad corporation, should he continue to use it for his own benefit, would be liable to passengers and to the owners of freight who should employ him, to the same extent precisely as the company itself while continuing the same business. Any other view of the liability of such intruder would be to allow him to allege his own wrong in his defence, and that would show no reason why the defendants (the lessees) are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees, or any others exercising the franchises of the company for the time, must be, — that is, that they are ostensible

parties who appear to the public to be exercising the franchises of the company."

¹ *St. Louis, &c. R. Co. v. Curl*, 28 Kan. 622; 16 Am. & Eng. R. Cas. 458; *Linfield v. Old Colony R. Co.*, 10 Cush. (Mass.) 562; 57 Am. Dec. 124; *Davis v. Providence, &c. R. Co.*, 121 Mass. 134; *Pierce v. Concord R. Co.*, 51 N. H. 590; *Hall v. Brown*, 54 N. H. 495; *Ditchett v. Spuyten Duyvil, &c. R. Co.*, 67 N. Y. 425; *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; *International, &c. R. Co. v. Dunham*, 68 Tex. 231; 31 Am. & Eng. R. Cas. 530.

The fact that the lease is invalid cannot affect the lessee's liability; one cannot allege his own wrong or want of power as a defence to an action of tort. *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; *Central R. & B. Co. v. Smith*, 76 Ala. 573 (*ante*, p. 545); *Ricketts v. Chesapeake, &c. R. Co.*, 33 W. Va. 433; 41 Am. & Eng. 42; *McCluer v. Manchester, &c. R. Co.*, 13 Gray (Mass.), 124; 74 Am. Dec. 624. See also, as upholding and applying the principles of the text, *Atlanta, &c. R. Co. v. Ray*, 70 Ga. 674; 22 Am. & Eng. R. Cas. 281; *Toledo, &c. R. Co. v. Rumbold*, 40 Ill. 143; *Missouri Pacific R. Co. v. Morrow*, 32 Kan. 217; 19 Am. & Eng. R. Cas. 630; *McMillan v. Michigan, &c. R. Co.*, 16 Mich. 79; *Cook v. Milwaukee, &c. R. Co.*, 36 Wis. 46; *Haff v. Minneapolis, &c. R. Co.*, 14 Fed. Rep. 558; 4 *McCrary* (U. S.), 622. A company's liability for fires is not affected by the fact that it runs its trains over a leased road. *Cotton v.*

unaffected by the void lease. It remains the same, the lessee being regarded merely as an agent.¹

3. Where the lease is made under due authority, so that there can be no objection to its validity, some authorities hold that the lessor is relieved from liability for injuries resulting from the *negligent operation* of the road.² But this admits of serious question unless the lease contains specific provision for the lessor's exemption from liability.³ One who sustains an injury in consequence of the negli-

Eastern R. Co., 45 Minn. 481. The lessee has been held liable for the continuance of a nuisance erected by the lessor. *Dickson v. Chicago, &c. R. Co.*, 71 Mo. 575; 2 Am. & Eng. R. Cas. 539.

¹ *Ricketts v. Birmingham, &c. R. Co.*, 85 Ala. 600; 37 Am. & Eng. R. Cas. 12; *Macon, &c. R. Co. v. Mayes*, 49 Ga. 355; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; 21 Am. & Eng. R. Cas. 226; *Ottawa, &c. R. Co. v. Black*, 79 Ill. 262; *Wabash, &c. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1; *Peoria, &c. R. Co. v. Lane*, 83 Ill. 448; *Ohio, &c. R. Co. v. Dunbar*, 20 Ill. 623; *St. Louis, &c. R. Co. v. Balsley*, 18 Ill. App. 79; *Bower v. Burlington, &c. R. Co.*, 42 Iowa, 546; *St. Louis, &c. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; *Nugent v. Boston, &c. R. Co.*, 80 Me. 62; 38 Am. & Eng. R. Cas. 52; *Norwich, &c. R. Co. v. Worcester*, 147 Mass. 518; 36 Am. & Eng. R. Cas. 447; *Breslin v. Somerville Horse R. Co.*, 145 Mass. 64; 32 Am. & Eng. R. Cas. 406; *Langley v. Boston, &c. R. Co.*, 10 Gray (Mass.), 103; *Bay City, &c. R. Co. v. Austin*, 21 Mich. 390; *Freeman v. Minneapolis, &c. R. Co.*, 28 Minn. 443; 7 Am. & Eng. R. Cas. 410; *Brown v. Hannibal, &c. R. Co.*, 27 Mo. App. 394; *Abbott v. Johnstown, &c. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; *Aycock v. Raleigh, &c. R. Co.*, 89 N. C. 321; *Lakin v. Willamette Valley R. Co.*, 13 Ore. 436; 26 Am. & Eng. R. Cas. 611; *Harmon v. Columbia, &c. R. Co.*, 28 S. C. 401; *Baxter v. New York, &c. R. Co.* (Tex. Civ. App.) 22 S. W. Rep. 1002; *Central, &c. R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; *International, &c. R. Co. v. Underwood*, 67 Tex. 589; *Ricketts v. Chesapeake, &c. R. Co.*, 33 W. Va. 433; 41 Am. & Eng. R. Cas. 42; *Nelson v. Vermont, &c. R. Co.*,

26 Vt. 717; 62 Am. Dec. 631 (leading case); *Washington, &c. R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Briscoe v. Southern Kansas R. Co.*, 40 Fed. Rep. 273; 40 Am. & Eng. R. Cas. 599. See also *Sellers v. Richmond, &c. R. Co.*, 97 N. C. 654; 25 Am. & Eng. R. Cas. 451.

In the case of *East Line, &c. R. Co. v. Culberson*, 72 Tex. 375; 38 Am. & Eng. R. Cas. 225, it was held that while a railroad company cannot by the sale or lease of its road avoid its duty to the public, or its liability for a breach of such duties, yet a lessor is not liable as a master or employer to the employes of the lessee operating the road. The court, however, recognizes the principles stated in the text as being sound when applied to other injuries resulting from the negligent management of the road, citing with approval *East Line, &c. R. Co. v. Rushing*, 69 Tex. 306, and other Texas cases cited *supra*. The case of *Macon, &c. R. Co. v. Mayes*, 49 Ga. 355, opposes the doctrine set up in the *Culberson* case.

² *Virginia Midland R. Co. v. Washington*, 86 Va. 629; 43 Am. & Eng. R. Cas. 693; *Lakin v. Willamette, &c. R. Co.*, 14 Ore. 436; 26 Am. & Eng. R. Cas. 611; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; 22 Am. & Eng. R. Cas. 277; *Pierce on Railroads*, p. 283; *Patterson's Ry. Acc. Law*, §§ 130, 131. The statement of this last authority is that "where a railway company, under due authority of law, has leased its line to another company, the lessor railway is not liable for torts committed by the lessee in the operation of its line." But the correctness of this is questionable. See *Pratt v. Atlantic, &c. R. Co.*, 42 Me. 579; *Ingersoll v. Stockbridge, &c. R. Co.*, 8 Allen (Mass.), 438.

³ There are numerous other cases, which hold the lessor liable although the lease

gent construction of the road may hold the lessor liable,¹ on the principle that the landlord is liable for the negligent construction and the tenant for the negligent use of the premises.² Thus, for injuries to live stock, resulting from a failure to fence the road, the lessor is liable,³ and it seems that the same would be true where a

was authorized by statute and was perfectly valid. The lessor is not released, these cases hold, unless the lease itself contains a specific exemption clause. *Singleton v. Southwestern R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; 21 Am. & Eng. R. Cas. 226 (injury to passenger in getting off the train); *Balsley v. St. Louis, & C. R. Co.*, 119 Ill. 68; 25 Am. & Eng. R. Cas. 497 (lease confirmed by the legislature, but lessor nevertheless held liable for fire started from lessee's trains); *Pratt v. Atlantic, & C. R. Co.*, 42 Me. 579 (same); *Aycock v. Raleigh, & C. R. Co.*, 89 N. C. 321 (same); *Pittsburgh, & C. R. Co. v. Campbell*, 86 Ill. 443 (same); *Chollette v. Omaha, & C. R. Co.*, 26 Neb. 159; 37 Am. & Eng. R. Cas. 16 (lease was authorized but contained no exemption clause — lessor held liable for injury to passenger in getting off the train caused by lessee's negligence); *Brown v. Hannibal, & C. R. Co.*, 27 Mo. App. 394; *Stearns v. Atlantic, & C. R. Co.*, 46 Me. 95; *Breslin v. Somerville Horse R. Co.*, 145 Mass. 64; 32 Am. & Eng. R. Cas. 410. A railway corporation can never be released from liability except by specific statutory exemption, and this exemption does not arise by implication from authority to lease. *Balsley v. St. Louis, & C. R. Co.*, 119 Ill. 68; 59 Am. Rep. 784; 25 Am. & Eng. R. Cas. 497; *Wabash, & C. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1; *Chollette v. Omaha, & C. R. Co.*, 26 Neb. 159; 37 Am. & Eng. R. Cas. 16.

¹ In the case of *Nugent v. Boston, & C. R. Co.*, 80 Me. 62; 38 Am. & Eng. R. Cas. 52, a brakeman, an employé of the lessee, was injured in consequence of the negligent construction of a station-house while in the discharge of his duties. The lease was valid, having been made under due authority. The court held, however, that as the lease did not stipulate for the lessor's exemption from liability, the lessor must be held liable for the injury. The court reviewed the case of *St. Louis, & C. R. Co. v.*

Curl, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458, which states the principle of the text, and went on to say: "And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owing to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility." The court further held that a covenant in the lease to "save the lessor harmless" did not affect the case, though the lessee had had possession and control of the station-house for some years.

² *St. Louis, & C. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; *Nugent v. Boston, & C. R. Co.*, 80 Me. 62; 38 Am. & Eng. R. Cas. 52; *Eakin v. Brown*, 1 E. D. Smith (N. Y.), 144; *Irvine v. Wood*, 51 N. Y. 124; *Allen v. Smith*, 76 Me. 335.

³ *Bay City, & C. R. Co. v. Austin*, 21 Mich. 390; *St. Louis, & C. R. Co. v. Curl*, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; *Whitney v. Atlantic, & C. R. Co.*, 44 Me. 362; *Fontaine, & C. R. Co. v. Southern Pacific R. Co.*, 54 Cal. 645; 1 Am. & Eng. R. Cas. 159; *East St. Louis, & C. R. Co. v. Gerber*, 82 Ill. 632.

The lessee is also liable for injuries resulting from a failure to fence the road, *Illinois Central R. Co. v. Kanouse*, 39 Ill. 272; *Missouri Pacific R. Co. v. Morrow*, 32 Kan. 217; 19 Am. & Eng. R. Cas. 630; *Ditchett v. Spuyten Duyvil R. Co.*, 67 N. Y. 425; reversing 5 Hun, 165; *Tracy v. Troy, & C. R. Co.*, 55 Barb. 529; affirmed, 38 N. Y. 433; *Cook v. Milwaukee, & C. R. Co.*, 36 Wis. 45.

passenger or employé of the lessee was injured by the negligent construction of the road.¹

In some of the States it is specifically provided by statute that the lessor and lessee shall be liable both jointly and severally.² It is to be observed that in no case can the lessor, under an authorized lease, be held liable for an injury which is purely the result of a breach of contract by the lessee as a carrier of goods.³

¹ Thus, the lessor, in a valid lease, has been held liable for an injury to an employé of the lessee resulting from the negligent construction of the road (*Nugent v. Boston, &c. R. Co.*, 80 Me. 62; 38 Am. & Eng. R. Cas. 52), while it is held not liable for an injury to such an employé resulting from the negligence of lessee's servants in operating the road. *East Line, &c. R. Co. v. Culberson*, 72 Tex. 375; 38 Am. & Eng. R. Cas. 225. But in Georgia it is said that the lessor should be held liable in the latter case as well as in the former. *Macon, &c. R. Co. v. Mayes*, 49 Ga. 355.

² *Fort Wayne, &c. R. Co. v. Hinebaugh*, 43 Ind. 354; *Stewart v. Chicago, &c. R. Co.*, 27 Iowa, 282; *Stephens v. Davenport, &c. R. Co.*, 36 Iowa, 327; *Stearns v. Atlantic, &c. R. Co.*, 46 Me. 95 (injury by fire); *Qnested v. Newburyport, &c. R. Co.*, 127 Mass. 204; *Davis v. Providence R. Co.*, 121 Mass. 134; *Breslin v. Somerville Horse R. Co.*, 145 Mass. 64; 32 Am. & Eng. R. Cas. 410; *Brown v. Hannibal, &c. R. Co.*, 27 Mo. App. 394. Statutory provisions that the lessee shall be liable are merely cumulative, and do not affect the remedy against the lessor; and *vice versa*. *Bower v. Burlington, &c. R.*

Co., 42 Iowa, 546. In Indiana, the rule is that if at the time stock are killed, owing to a defect in the fence, the road is operated by the lessee in the name of the lessor, both parties are equally liable; if it is operated in the lessee's name under a valid lease, the lessee alone is liable. *Pittsburgh, &c. R. Co. v. Bolner*, 57 Ind. 572; *Pittsburgh, &c. R. Co. v. Hannon*, 60 Ind. 417; *Cincinnati, &c. R. Co. v. Bunnell*, 61 Ind. 183.

³ *Patterson v. Wabash, &c. R. Co.*, 54 Mich. 91; 18 Am. & Eng. R. Cas. 130; *Philadelphia, &c. R. Co. v. Anderson*, 94 Penn. St. 351; 6 Am. & Eng. R. Cas. 407; *Mahoney v. Atlantic, &c. R. Co.*, 63 Me. 68; *Murch v. Concord R. Co.*, 29 N. Y. 35; 61 Am. Dec. 631. In the case of *Langley v. Boston, &c. R. Co.* 10 Gray (Mass.), 103, a different doctrine was applied, but there the lease was wholly unauthorized. See *McCluer v. Manchester, &c. R. Co.*, 13 Gray (Mass.), 124; 74 Am. Dec. 624. Under a lease transferring to the lessee all the lessor's contracts, the lessor cannot be held liable for goods delivered to the lessee under a contract between the owner of the goods and the lessor. *Pittsburgh, &c. R. Co. v. Hinebaugh*, 4 Brewst. (Penn.) 115.

CHAPTER XXXII.

LEGISLATIVE CONTROL.

SEC. 491. Limitations upon Legislative Power.
 492. Exclusive Rights.
 493. Reservation of Right to Amend or Repeal.

SEC. 494. Effect of Repeal.
 495. Police Power of the State.
 496. Regulation of Freight and Passenger Charges.

SEC. 491. **Limitations upon Legislative Power.**—The Federal Constitution imposes an absolute bar upon the power of State legislatures to pass any law which impairs the obligation of a contract, and, as charters of private corporations are universally held to be contracts, they come within the saving operation of this restriction.¹ A grant is a contract, and implies an obligation not to reassert the right granted. And a gift of franchises and powers, as distinguished from a gift of property, is within this rule. Whether there was any consideration for it, moving from the corporation to the grantor of the charter, is immaterial. If a consideration were necessary, it might be found in the implied stipulations on the part of the grantees, and in the acts of those who deal with them on the faith of it. And such grant is not incapable of being deemed a contract because the corporation has no existence when the grant is made.² No

¹ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Thorpe v. Rutland, &c. R. Co.*, 27 Vt. 140; *Conn. v. Eastern R. Co.*, 103 Mass. 254; *Delaware Tax Cases*, 18 Wall. (U. S.) 206; *State v. Noyes*, 47 Me. 189; *Stone v. Mississippi*, 101 U. S. 814; *Washington Bridge Co. v. State*, 18 Conn. 53; *Philadelphia, &c. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Erie, &c. R. Co. v. Carey*, 26 Penn. St. 287; *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co.*, 4 G. & J. (Md.) 1; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Flint, &c. Plank-Road Co. v. Woodhull*, 25 Mich. 99; *St. Louis v. Manufacturers' Bank*, 49 Mo. 574; *Hamilton v. Keith*, 5 Bush (Ky.), 458; *Farrington v.*

Tennessee, 95 U. S. 679; *Smead v. Indianapolis, &c. R. Co.*, 11 Ind. 104; *Alabama, &c. R. Co. v. Burkett*, 46 Ala. 569; *New Orleans, &c. R. Co. v. Harris*, 27 Miss. 517.

² *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Piqua Branch v. Knoop*, 16 How. (U. S.) 369; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.), 436; *Franklin Branch Bank v. Ohio*, 1 Black (U. S.), 474; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 371; 11 Pet. (U. S.) 419; *Boston, &c. R. Co. v. Salem, &c. R. Co.*, 2 Gray (Mass.), 1; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28; *Derby*

distinction exists in this respect between the franchises and the administrative part of the charter. Unless a power is reserved for this purpose, the government cannot, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or change or control the administration of the property, or compel the corporation to receive a new charter.¹ But if the act of incorporation is a grant of political power, — as, if it creates a civil institution to be employed in the administration of the government, or if the funds of the corporation are public property, or the State, as a government, is alone interested in its transactions, — the legislature in such a case may freely modify its charter. But if it is a private institution endowed with a capacity to take property for objects unconnected with government, whose funds are invested by individuals on the faith of the charter, the charter is a contract which the legislature cannot impair without the consent of the corporation.² And according to the cases last cited the fact that the purpose of the corporation is an object of public or even national concern, does not render it a public corporation; nor does the fact of incorporation change its character in this respect, or give the legislature any power over it. The right to change civil institutions is not founded on their being incorporated, *but on their being the instruments of government created for its purposes.* The right to incorporate belongs to the legislative powers, but not to be exercised as in general legislation, to grant and repeal at pleasure. In one sense an act of incorporation of a private corporation is a law, in another it is a

Turnpike Co. v. Parks, 10 id. 522; Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co., 17 id. 40; Washington Bridge Co. v. Connecticut, 18 id. 53; Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35; Pingry v. Washburn, 1 Aik. (Vt.) 264; State v. Branin, 23 N. J. L. 484; Com. v. United States Bank, 2 Ashm. (Penn.) 349; Brown v. Hummel, 6 Penn. St. 86; State v. Commercial Bank of Cincinnati, 7 Ohio, 125; Michigan Bank v. Hastings, 1 Doug. (Mich.) 225; Smead v. Indianapolis, &c. R. R. Co., 11 Ind. 104; University of Maryland v. Williams, 9 G. & J. (Md.) 365; Young v. Harrison, 6 Ga. 130; Macon & Western R. R. v. Davis, 13 id. 68; City of Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642; Woodfork v. Union Bank, 3 Coldw. (Tenn.) 488; Nevill v.

Bank of Port Gibson, 15 Miss. 513; Gorman v. Pacific R. R., 26 Mo. 441; Wales v. Stetson, 2 Mass. 143; Thorpe v. Rutland, &c. R. R. Co., 27 Vt. 140; Seymour v. Hartford, 21 Conn. 486; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; Com. v. Cullen, 13 Penn. St. 133; State v. Dawson, 22 Ind. 272; Guillothe v. City of New Orleans, 12 La. An. 432. Contrary, see State v. Southern, &c. R. R. Co., 24 Tex. 80; Toledo Bank v. Bond, 1 Ohio St. 622; and Mechanics & Traders Bank v. Debolt, id. 591. The last case was reversed in the Supreme Court of the United States, 18 How. (U. S.) 380.

¹ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

² Allen v. McKeen, 1 Sumn. (U. S.) 276; Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642.

grant. As between the State and the corporators it is a grant of powers, which by the act pass out of the State and are vested in the corporation, and can only be forfeited by breach of condition. The persons who compose it cannot be disseised of their privileges except by the law of the land.¹ Where a single corporation is formed by charters granted by several States, for the purpose of constructing a public work, extending into both States, and contemplated as one continuous and entire highway, the charters become a compact between the States and the company, and the assent of all is necessary to give validity to a statute of either State infringing the powers of the corporation in either State.² From what has been said, it will be seen that unless the right to amend or repeal the charter is reserved therein, the legislature has no authority to impose any burdens upon a corporation created by it, which in any measure impair any of the obligations of the contract as evidenced by the charter; nor can it, after the rights of the corporation have vested under the charter, summarily repeal it.³ Such charters, although a law, are also contracts between the corporation and the State, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as though they were contracts between individuals.⁴ The rights of a corporation under a charter may be said to be vested, when it has accepted it, and organized under it, and performed such conditions precedent, if any, as are essential to give it corporate life. Where the legislature grants a charter to a railway company, with a provision that it may charge such rates for the transportation of freight and passengers as the directors may fix, it has no power to establish different rates, or to provide a different tribunal for the establishment of rates.⁵ So if the charter exempts the corporate property from taxation, it has no power to make it taxable;⁶ nor if it provides that it shall pay a certain specified sum in lieu of all other taxes, can it provide that it shall pay a different sum or in a different manner.⁷

¹ *State v. Heyward*, 3 Rich. (S. C.) L. 389.

² *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 G. & J. (Md.) 140.

³ *Allen v. Buchanan*, 9 Phila. (Penn.) 283.

⁴ *Flint, &c. Plank-Road Co. v. Woodhull*, 25 Mich. 99.

⁵ *Hamilton v. Keith*, 5 Bush (Ky.), 458.

⁶ *Mobile, &c. R. R. Co. v. Mosely*, 52 Miss. 127; *Northwestern University v. People*, 99 U. S. 304.

⁷ *Farrington v. Tennessee*, 95 U. S. 679.

Nor can a turnpike company which is authorized to establish gates at such points as its directors might designate, be compelled to establish them at some other point,¹ or to allow certain persons to pass free.² A railroad company which has taken lands for its road and paid compensation therefor under the provisions of a statute, cannot by a subsequent statute be compelled to pay damages not contemplated by the original act;³ nor indeed can any restrictions or burdens be imposed upon a corporation by the legislature, which were not imposed or contemplated by the original grant,⁴ except such as come within the police power of the State,⁵ or within the reservations of the charter itself. Whatever property a corporation lawfully acquires is held under the same guarantees which protect the property of private persons from spoliation; and even where the power to amend, alter, or repeal its charter exists, the legislature cannot exercise a control over its property, except such as may be exercised through control over its franchise, and other like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.⁶

SEC. 492. Exclusive Rights.—The legislature may invest a railway or other corporation with an exclusive right, and when it has done so, and the right has vested in the corporation under the charter, it cannot repeal or impair it, either by a statute or by a change in the State constitution. Thus, in a case before the Circuit Court of the United States,⁷ the legislature of Louisiana in 1877 gave to a water-works company the exclusive right and privilege of supplying the city of New Orleans with water. In 1879 the constitution of the State was amended so as to proclaim the abolition of the monopoly features of the charters of corporations. It was held that this provision of the constitution impaired the obligation of the contract in the charter named, and therefore was unconstitutional.

¹ *Attorney-General v. Germantown, &c. Turnpike Co.*, 55 Penn. St. 466.

² *Pingry v. Washburn*, 1 Aik. (Vt.) 264.

³ *Towle v. Eastern R. R. Co.*, 18 N. H. 547; 17 id. 519.

⁴ *State v. Noyes*, 47 Me. 189; *People v. Jackson, &c. Plank-Road Co.*, 9 Mich. 285; *Bailey v. Philadelphia, &c. R. R. Co.*, 4 Harr. (Del.) 389; *Monongahela Navigation Co. v. Coon*, 6 Penn. St. 379; *Ireland v. Palestine, &c. T. Co.*, 19 Ohio St. 369; *New Orleans, &c. R. R. Co. v.*

Harris, 27 Miss. 517; *Miller v. State*, 15 Wall. (U. S.) 478; *Oldtown, &c. R. R. Co. v. Veazie*, 39 Me. 571; *University v. North Carolina R. R. Co.*, 76 N. C. 103; *Sage v. Dollard*, 15 B. Mon. (Ky.) 340.

⁵ *Cane v. Intoxicating Liquors*, 115 Mass. 153.

⁶ *Field, J.*, in *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. Rep. 722, modified in 116 U. S. 138.

⁷ *New Orleans Water Works Co. v. St. Tammany Co.*, 14 Fed. Rep. 194; 120 U. S. 65, 67.

It is competent for the legislature creating a corporation for the purpose of constructing roads or other public works and improvements, to grant, without reservation of a power to repeal, an exclusive right, and to stipulate that the State shall not subsequently make any other grant inconsistent with such exclusive right. It is true that for general purposes of legislation, the legislature has full power to repeal former laws, and, of course, the last legislative act is binding, and necessarily repeals all prior acts which are repugnant thereto. But in addition to the law-making power, the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises for purposes necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests; and of the necessity and convenience of such improvements, of their fitness and the best modes of providing them, the established government of the State, acting by the legislature for the time being, must necessarily judge and determine. In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature, and a just estimate of the public benefit to be procured, and the cost at which it is to be obtained; and, as great changes in the state of things may take place in the progress of time, a great increase of travel, for instance, on a given line, which changes cannot be specifically foreseen, it is the part of wisdom to provide for this. But when such a contract has been made on considerations of an equivalent public benefit, and when the grantees have advanced their money to the public upon the faith of it, the State is bound, by the plain principles of justice, faithfully to respect all grants and rights thus created and vested by the contract. Such a power of regulating public rights is everywhere recognized as one distinguishable from that of legislation, a power incident and necessary to all well-regulated governments, and when rightly exercised is within the constitutional power of the legislature and binding upon the government and people.¹

Thus the act incorporating the Boston & Lowell Railroad corporation, which was one of the earliest railroad charters granted, provided that no other railroad than the one granted should, within thirty years from and after the passing of this act, be authorized to be made, leading from Boston, Charlestown, or Cambridge to Lowell, the legislature also reserving in the act the right to regulate the

¹ Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co., 17 Conn. 40.

tolls to a certain extent, and to purchase the franchise upon certain terms. It was held that this provision, contained as it was in the charter as an inseparable part of it, constituted a contract by the commonwealth with the corporation that no other such railroad should be lawfully made for thirty years. He who has the power of conferring a right or a franchise lying solely in grant, and who stipulates for a valuable consideration that another shall have and enjoy it undisturbed and unmolested by any act or permission of his, in effect grants such right or franchise. But, more especially, when such right is conferred by the community in the form of a statute having all the forms of law, and is sanctioned by the government acting in behalf of all the people, and having power to bind them by law, such right would seem to be clothed with as much solemnity, and to have the same effect and force, as if it were the grant of an exclusive right in terms.

Granting to several other railroad corporations the right to establish, by means of junctions with each other, a continuous line of transportation by railway from Lowell to Boston, was held to be beyond the power of the legislature, such a connection being justly deemed to be making a railway within the meaning of the plaintiff's charter, and such an infringement as to be a nuisance to their rights.¹

But unless the grant is made exclusive in express terms, the legislature is not presumed to have intended to bind itself not to authorize similar enterprises which may seriously interfere with a previous grant, or even destroy it. This principle has been acted upon in numerous cases, and is so well settled as not to admit of doubt or discussion.² An exclusive grant may be made out, however, by reference to some other act of the legislature which imports a contract, or by the prohibition of similar enterprises, either in the charter

¹ *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray (Mass.), 1.

² *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 419; *Newcastle, &c. R. R. Co. v. Penn., &c. R. R. Co.*, 3 Ind. 464; *Collins v. Sherman*, 31 Miss. 379; *Shorter v. Smith*, 9 Ga. 517; *Indian Cañon Road Co. v. Robinson*, 13 Cal. 519; *Fall v. Sutter County*, 21 Cal. 237; *Baltimore, &c. R. R. Co. v. State*, 45 Md. 596; *Fitch v. New Haven, &c. R. R. Co.*, 30 Conn. 38; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *White River T. Co. v. Vt. Central R. R. Co.*, 21 Vt.

590; *Bartram v. Central T. Co.*, 25 Cal. 283; *Thompson v. N. Y. & Hudson River R. R. Co.*, 3 Sandf. (N. Y.) Ch. 625; *in re Hamilton Avenue*, 14 Barb. (N. Y.) 405; *Oswego Falls Bridge v. Fish*, 1 Barb. Ch. (N. Y.) 547; *Camblas v. Phila., &c. R. R. Co.*, 4 Brewst. (Penn.) 563; *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71; *Delaware, &c. Canal Co. v. Camden, &c. R. R. Co.*, 14 N. J. Eq. 321; 16 id. 546; *State v. Noyes*, 47 Me. 189; *Pontchartrain R. R. Co. v. New Orleans Nav. Co.*, 15 La. An. 504.

itself or the general law.¹ But these exclusive grants, being in derogation of public rights, are strictly construed, and will not be extended to include any other than similar enterprises. The rule of construction as applied to charters of private corporations is that, in so far as they confer privileges or powers upon corporations, they must be strictly construed. Ambiguities and uncertainties in the expressions used must operate against the corporation, and only those privileges which are clearly conferred can be claimed.²

If the language of a statute provision conferring privileges upon a corporation is ambiguous or inconsistent with itself, a construction which favors the public convenience and trade, and abridges the grant, is to have preference over one which favors the company.³ Under this rule privileges granted in a charter of a corporation will not be deemed exclusive, so as to render unconstitutional a subsequent charter of another company, conferring similar privileges, unless it clearly appears in the charter of the first that the grant made to it was exclusive, and that it was intended to preclude the State from subsequently granting similar privileges to any other.⁴ So it is held that an exclusive grant to a railroad company of

¹ *Micon v. Tallussee Bridge*, 47 Ala. 652; *Binghampton Bridge Co., in re.*, 27 N. Y. 87; 3 Wall. (U. S.) 51; *Bridge Co. v. Hoboken Co.*, 13 N. J. Eq. 81; 1 Wall. (U. S.) 116.

² *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 419; *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71; *Rice v. Railroad Co.*, 1 Black (U. S.), 358; *Jefferson Branch Bank v. Skelly*, 1 id. 436; *Wales v. Stetson*, 2 Mass. 146; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. (N. Y.) 547; *Shorter v. Smith*, 9 Ga. 517; *Macon & Western Railroad v. Davis*, 13 Ga. 68; *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *State v. Chase*, 5 Ohio St. 528; *Com. v. Central Passenger R. R.*, 52 Penn. 506; *Collins v. Sherman*, 31 Miss. 679; *Scales v. Pickering*, 4 Bingh. 448.

³ *Stormfeltz v. Manor Turnpike Co.*, 13 Penn. St. 555; *McLeod v. Burroughs*, 9 Ga. 213; *Justices, &c. v. Griffin & West Point Plank Road Co.*, 9 id. 475; *Stourbridge Canal Co. v. Wheeley*, 3 B. & Ad. 792; *Parker v. Great Western Railway Co.*, 7 M. & G. 253.

⁴ *Collins v. Sherman*, 31 Miss. 679.

The provisions of a statute authorizing companies to levy any charge upon the public, must be construed strictly. *Stockton & Darlington Railway Co. v. Barrett*, 11 C. & F. 590; *Heddy v. Wheelhouse*, Cro. Eliz. 558. The right to take tolls, freight, and fares can only be exercised by corporations under an express grant in their charters, and can never be raised by implication; charters conferring this right will always be construed most favorably to the public. *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. L. 623. Words intended to limit the powers of the corporation cannot be construed to describe, and so to limit, the rights of the public. *Perine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172. As a rule, corporate powers cannot be created by implication, nor extended by construction, and no privilege is granted unless it is expressed in plain and unequivocal words. *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St. 9; *Wright v. Briggs*, 2 Hill (N. Y.), 77; *Mayor, &c. of Bacon v. Macon & Western R. R. Co.*, 7 Ga. 221.

the right to carry passengers is not infringed by a grant to another company to build a railroad for carrying freight,¹ and that the grant of an exclusive right to build a railroad for carrying freight and passengers by steam is not infringed by a grant to another company to build a railroad for carrying passengers by horse-power;² nor is a grant the evident purpose of which is to protect *through* traffic, infringed by the grant of railroads which only compete between intermediate points.³ The same principle has been applied to other corporations,⁴ and it may be said that the tendency of the courts is in the direction of a liberal exercise of the police power of the State for the regulation and control of railway and other corporations, even though the grant is exclusive,⁵ and new burdens and restrictions are thereby imposed.

SEC. 493. **Reservation of Right to Amend or Repeal.** — The legislature may reserve the right to alter, amend, or repeal a charter, by a provision either in the charter itself or in the general law; and when such power is reserved it may make any reasonable amendments, or impose upon the corporation any additional burdens, duties, or liabilities which are reasonable, which do not destroy or impair any of the vested rights of the corporation. But it cannot under such a reservation make amendments which take away its property without just compensation, or defeat the essential rights which were granted to it under its charter. Thus, a State statute providing that no plank-road company organized under a general act mentioned, to which the statute was an amendment, should maintain a toll-gate within the corporate limits of a city or village without the consent of the local authorities, or collect toll for any portion of its road within such limits in which a pavement was maintained by the municipality, it was held invalid where the effect of its enforcement would be to deprive a company of the right to take toll on two and a half miles of its road; and the fact that the general act contained a provision authorizing the legislature to amend, repeal, or alter such act, would not affect the result. SAID COOLEY, J.:

¹ *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 77.

² *Louisville, &c. R. R. Co. v. Louisville City R. R. Co.*, 2 Duv. (Ky.) 175.

³ *Pontchartrain R. R. Co. v. New Orleans, &c. R. R. Co.*, 11 La. An. 253.

⁴ *Lake v. Virginia, &c. T. R. Co.*, 7 Nev. 294; *Mohawk Bridge v. Utica, &c. R. R. Co.*, 6 Paige, Ch. (N. Y.) 554;

New York v. New England Transfer Co., 14 Blatchf. (U. S. C. C.) 159; *McLeod v. Savannah, &c. R. R. Co.*, 25 Ga. 445.

⁵ *Boston, &c. R. R. Co. v. State*, 32 N. H. 215; *State v. Noyes*, 47 Me. 189; *Indianapolis, &c. R. R. Co. v. Kercheval*, 16 Ind. 84; *Bulkley v. New York, &c. R. R. Co.*, 27 Conn. 479.

"There is no well-considered case in which it has been held that a legislature, under the power to amend a charter, might take from the corporation any of its substantial property or property rights.¹ In the New York case last cited it was decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with provision for compensation. The decision was in accordance with a Massachusetts case² in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' The same doctrine is clearly asserted and affirmed in the United States Supreme Court,³ and is assumed to be unquestionable in the several opinions delivered in a previous case in that court.⁴ But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, — whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the law of the land." Even municipal corporations, though their charters are in no sense contracts,

¹ *Detroit v. Detroit & Howell's Plank-Road Co.*, 43 Mich. 146; *Albany, &c. R. R. Co. v. Brownell*, 24 N. Y. 345.

² *Com. v. Essex Co.*, 13 Gray (Mass.), 239, 253.

³ *Railroad Co. v. Maine*, 96 U. S. 499.

⁴ *Sinking Fund Cases*, 99 U. S. 700.

are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it.¹

Subject to some extent to an exception in favor of the right of the State to amend the charter of a private corporation, under an express reservation of authority to do so, or in the exercise of its police power, the rule is that the amendment of such charters, to become binding and effectual, must be accepted on the part of the corporators. Alterations in such charters which are not fundamental, and are authorized by the legislature, may be effectually accepted by a majority of the stockholders; that is to say, by a majority *per capita* when the right to vote is *per capita*, and by a majority of stock where each share of the stock is entitled to one vote. *Alterations which change the nature and purposes of the corporation, or of the enterprise for which it was created, are fundamental, while those which work no material change are not fundamental.*² The principle upon which these cases go is that alterations, or as they are sometimes called, amendments, which do not change the nature, purpose, or character of a corporation or its enterprise, but which are designed to enable the corporation to conduct its authorized business with greater facility, more beneficially or more wisely, are auxiliary to the original object; and that therefore when one becomes a stockholder he impliedly assents that such alteration or general amendment may be made.³ "We may add what appears to be an obvious consideration, that if no alteration or amendment of a corporate charter can be made, even in matters of administrative detail, or as to the means and agencies through which the corporate enterprise shall be carried on, except with the consent of every stockholder, the

¹ *Terrett v. Taylor*, 9 Cranch. (U. S.), 43; *Pawlet v. Clark*, 9 id. 292; *State v. Haben*, 22 Wis. 660; *People v. Common Council*, 28 Mich. 228.

² BERRY, J., in *Mower v. Staples*, 32 Minn. 234; *Hartford, &c. R. Co. v. Crosswell*, 5 Hill (N. Y.), 383; *Stevens v. Rutland, &c. R. Co.*, 29 Vt. 546; *Curry v. Scott*, 54 Penn. St. 270; *Kenosha, &c. R. Co. v. Marsh*, 17 Wis. 13; *Nugent v. Supervisors*, 19 Wall. (U. S.) 241; *Everhart v. West Chester, &c. R. Co.*, 28 Penn. St. 339; *New Haven, &c. R. Co. v. Chapman*, 38 Conn. 56; *Clearwater v. Meredith*, 1 Wall. (U. S.) 25; *Union Locks & Canals v. Towne*, 1 N. H. 44; *Martin v. Railroad*

Co., 8 Fla. 382; *Witter v. Railroad Co.*, 20 Ark. 463; *Hester v. Memphis, &c. R. Co.*, 32 Miss. 378; *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Hoey v. Henderson*, 32 La. An. 1069; *Banet v. Alton, &c. R. Co.*, 13 Ill. 504; *Zabriskie v. Hackensack, &c. R. Co.*, 18 N. J. Eq. 178; *Mowrey v. Indianapolis, &c. R. Co.*, 4 Biss. (U. S.) 78; *Field Corp.* §§ 81, 388.

³ *Stevens v. Rutland, &c. R. Co.*, 29 Ill. 546; *New Haven, &c. R. Co. v. Chapman*, 38 Conn. 56; *Banet v. Alton, &c. R. Co.*, 13 Ill. 504; *Hartford, &c. R. Co. v. Crosswell*, 5 Hill (N. Y.), 383; *Kenosha R. Co. v. Marsh*, 17 Wis. 13; *Joy v. J. & M. Plank-Road Co.*, 11 Mich. 156.

result would be not only great public and private inconvenience, but in many cases a complete practical failure of the enterprise itself. Certainly this is not in accordance with the understanding or the practice of the courts, of the profession, or of those who have been engaged in carrying on our great corporate undertakings.”¹

In the Minnesota case referred to the alteration proposed was to increase the number of directors from five to nine, and it was held not to be fundamental within the definition given and sanctioned by the authorities. Said BERRY, J.: “It in no way changes the nature or purpose of the boom company, or of the enterprise for which it was created. It is a change respecting *modus operandi* merely, — a change, not of the nature or purpose or character of the company, or of the company’s enterprise, but a change of the instrumentalities and agency — the machinery by which that purpose is to be effected and that enterprise carried on.”²

It may be said that the rule, is well established that a reserved power to amend, alter, or repeal a charter, authorizes the legislature, in general, to make any alteration which does not defeat or substantially impair the object of the grant, or rights which may have vested under it, and which the legislature may deem necessary either to promote the corporate purpose, or to secure other public or private rights. Thus, where a manufacturing company was created, with authority to construct a dam on paying damages to the owners of fishing rights above, and its charter contained no express exemption from obligation to construct a way for fish to pass the dam, but was subject to a general power reserved to amend or alter, it was held that the legislature might impose upon the corporation the duty of constructing a fish-way in the dam, satisfactory to commissioners appointed for the purpose.³

So it may alter and regulate the fares charged by a railroad company formed by consolidation of companies,⁴ or may authorize the company to reduce the capital, on consent of a certain majority of the stockholders;⁵ or may impose a tax on the capital stock of the company, notwithstanding a supplemental act that the “capital stock

¹ BERRY, J., in *Mower v. Staples*, 32 Minn. 284.

² In *Everhart v. West Chester, &c. R. Co.*, 28 Penn. St. 339, an amendment providing for the election of three additional managers, that is, directors, was upheld. In *New Haven, &c. R. Co. v. Chapman*, 38 Conn. 56; an amendment authorizing

two of the directors to be appointed by the city of New Haven, a subscriber for stock, was held not to violate the contract.

³ Com’rs on Inland Fisheries v. *Hol-yoke Water-Power Co.*, 104 Mass. 446.

⁴ *Shields v. State*, 26 Ohio St. 86.

⁵ *Joslyn v. Pacific Mail Steamship Co.*, 12 Abb. Pr. (N. Y.) n. s. 329.

and dividends" of that kind of corporations should not be taxable;¹ or require a railroad company to maintain fences along their roads where running within the limits of highways;² and make it liable for cattle injured by its trains by reason of its omission to maintain cattle-guards,³ or to lower the grade of its road so as to cross highways or other railroads at grade,⁴ or to discontinue the use of steam power in cities;⁵ or compel connection with another railroad,⁶ or compel it to establish stations and stop its trains at them;⁷ or indeed may impose any duty, burden, or liability upon a railway corporation which does not operate a fundamental change in the charter rights of the corporation; and this power may exist under a provision of the general laws in force when the charter was granted, although no reference to such general law is made in the charter;⁸ and such reservation has the same force as a special reservation in the charter.⁹

While, under a reservation of authority to alter, amend, or repeal a charter, the charter may be repealed at the pleasure of the legislature, yet its charter cannot be modified without the consent of the corporation; but if it refuses to accept the statutory modification it must cease to transact business in a corporate capacity, or it will be treated as having accepted it, and will be bound thereby.¹⁰ If the right to repeal the charter is made conditional upon the fact of some misuse or abuse of the franchises, it cannot be repealed except after some inquiry has been instituted to ascertain the facts, and the corporation has had an opportunity to be heard in its defence.¹¹ Where there is any doubt as to the acceptance of an amendment to the charter by a corporation, where acceptance is necessary, the court may direct a stock vote to be taken.¹² Where the charter provides

¹ *Union Improvement Co. v. Commonwealth*, 69 Penn. St. 140.

² *Durand v. New Haven &c. R. R. Co.*, 42 Conn. 211.

³ *Jeffersonville R. R. Co. v. Gabbert*, 25 Ind. 431.

⁴ *People v. Boston & Albany R. R. Co.*, 70 N. Y. 569; *White v. Quincy*, 97 Mass. 430; *Roxbury v. Boston, &c. R. R. Co.*, 6 Cush. (Mass.) 424; *Bangor, &c. R. R. Co. v. Smith*, 47 Me. 34; *Pittsburgh, &c. R. R. Co. v. Southwest Penn. R. R. Co.*, 77 Penn. St. 173.

⁵ *Buffalo, &c. R. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209.

⁶ *Fitchburg R. R. Co. v. Grand Junction R. R. Co.*, 4 Allen (Mass.), 198.

⁷ *Com. v. Eastern R. R. Co.*, 103 Mass. 254.

⁸ *State v. Person*, 32 N. J. L. 134; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Holyoke Co. v. Lyman*, 15 id. 500; *Tomlinson v. Jessup*, 15 id. 454; *State v. Com'rs of Railroad Taxation*, 37 N. J. L. 228.

⁹ *Griffin v. Kentucky Ins. Co.*, 3 Bush (Ky.), 592.

¹⁰ *Yeaton v. Bank of the Old Dominion*, 21 Gratt. (Va.) 593.

¹¹ *Mayor, &c. of Baltimore v. Pittsburgh, &c. R. R. Co.*, 1 Abb. (U. S.) 9.

¹² *Matter of Mercantile Library Co.*, 2 Brews. (Penn.) 447.

that it shall not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions" of the charter, the question of violation is a judicial question, and the charter cannot be repealed until the violation has been made to appear to the legislature by some proper judicial proceeding. Where, therefore, the legislature passed an act, not purporting to be based upon any such finding, but simply providing that the charter "be and the same is hereby repealed," it was held that if such act could be regarded as a legislative determination that a violation of the charter had taken place, it would nevertheless be void, as an attempt at the exercise by the legislature of judicial power. Such an act, could not be sustained, subject to a right in the corporators to have the question of violation tried in the courts afterward. There can be no appeal to the courts from the conclusions of the legislature in matters within its jurisdiction and the fact, if valid for any purpose, must be conclusive. But the legislature cannot pass finally upon questions of private right.¹

The question whether an amendment of a charter is material or not is purely one of law for the court, and should not be submitted to the jury.²

SEC. 494. Effect of Repeal. — When the charter of a corporation is repealed under a power reserved therein, the effect is that the statute under which the corporation was created no longer exists; and whatever force the law may give to transactions entered into and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights. The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract, and choses in action, are not destroyed by such repeal; and if the legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power. If the repeal of the old corporation was within the power of the legislature, it could charter a new one, and confer the same powers on it as the former had possessed, and so far as the property or franchises of the

¹ Flint, &c. Plank-Road Co. v. Woodhull, 25 Mich. 99.

² Memphis Branch E. R. Co. v. Sullivan, 57 Ga. 240.

old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor. A statute which under this power repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States, if it provides for compensation for the property of the extinct corporation so taken by the new one.¹

SEC. 495. Police Power of the State. — Whether there is any reservation of a right to alter, amend, or repeal, in the charter of a corporation, there is no question but that the corporation is nevertheless subject to such laws as the legislature may enact for the safety of the lives, the preservation of the health, safety, and good order of the community, which do not directly conflict with a right granted by the charter. The corporation, because invested with certain special powers and privileges, is not thereby put outside of legislative control, or beyond its regulatory power, as to matters not affecting its essential franchises, or which do not deprive it of its property in a manner in which the State has contracted not to deprive it, even though the value of such franchises, by reason of such laws, is lessened. This power is an essential attribute of sovereignty, and is exercised under the general police power of the State, of which it would be idle to presume it ever intended to divest itself;² and corporations, as well as individuals are amenable thereto, and the one is as much subject thereto as the other. In a leading case under this head,³ REDFIELD, C. J., said: "The power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature, — which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot, therefore, be violated, so as to deprive the legislature of the power, even by express grant to any mere public

¹ *Greenwood v. Union Freight R. Co.*, 105 U. S. 13.

² *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *Richmond, &c. R. R. Co. v. Richmond*, 26 Gratt. (Va.) 83; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349; *Stone v. Mississippi*, 101 U. S. 814; *Beer Co. v. Massachusetts*, 97 U. S. 25; 115 Mass.

153; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Chicago, &c. R. R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *Coates v. New York*, 7 Cow. (N. Y.) 585; *Com. v. Alger*, 7 Cush. (Mass.) 53; *Watertown v. Mayo*, 109 Mass. 315.

³ *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140.

or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railways, to be carried into effect by their by-laws and other regulations, it is of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would.

"This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim *sic utere tuo ut alienum non lædas*, which is universal in application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railways are concerned, this police power, which resides primarily and ultimately in the legislature, is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, — and in all doubtful cases their judgment is final, — require the several railways in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.¹ There would be no end of

¹ Lake Shore, &c. R. R. Co. v. Cin- 256; Lake View v. Rose Hill Cemetery
cinnati, &c. R. R. Co., 30 Ohio St. 604; Co., 70 Ill. 191; Kansas Pacific R. R.
State v. Columbus Gas-light Co., 34 Co. v. Mower, 16 Kan. 573; Boston, &c.
Ohio St. 472; Ruggles v. People, 91 Ill. R. R. Co. v. State, 32 N. H. 215; Frank-

illustrations upon this subject, which in the detail, are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axle-trees, the number of brake-men upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and many similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be.¹

"There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question.

"All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College v. Woodward* was decided, and which every well-considered case upon the subject in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railways, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country." But, even this power is subject to constitutional limitations, and must have reference to the comfort, safety, and welfare of society, and, as applied to corporations, must not conflict with their charters; and the legislature has no power, under the pretence of police regulations, to divest it of any of its essential rights or privileges.² Thus an amendment of the charter of a railroad company which repeals a provision of the original charter allowing the company to charge such rates of freight as should be fixed by the directors, and establishes a tariff of way freights, is un-

fort, &c. *R. R. Co. v. Philadelphia*, 58 Penn. St. 119; *People v. Boston & Albany R. R. Co.*, 70 N. Y. 569; *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261.

¹ *Hegeman v. Western R. R. Co.*, 16 Barb. (N. Y.) 353.

² *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.

constitutional, if no right of amendment was reserved in the original charter, or by any general statute existing at the time of the incorporation.¹ So where the charter of a bank authorized it to construct water-works for a certain city, and declared that after the expiration of a specified time it should be lawful for the city to purchase such water-works on terms prescribed, and pay for them in bonds of the city; and the bank was required to sell the works on the prescribed terms, upon the election of the city to purchase,—it was held that this charter constituted a contract with the bank; and an act of the legislature, passed after the expiration of the time specified, and after the election by the city to purchase the works, which imposed onerous conditions upon the issue of bonds by the city, so far as such act was applicable to bonds to be issued to the bank in payment for the water-works, impaired the obligation of the contract with the bank, and was therefore void.² But while rights which are vested by the charter of a private corporation in the corporators and stockholders cannot be impaired by subsequent legislation, yet a charter may be amended in so far as is necessary to carry into effect or accomplish the purposes for which it was obtained.³ Legislative control of the use of property of a corporation is not lost by an omission to reserve power to repeal or amend its charter. Thus the prohibition of the sale of malt liquors, being in the nature of a police regulation, does not impair the obligation of the contract contained in the charter of any brewery corporation created before the passage of that statute, and which is by its charter authorized to manufacture malt liquors; although no power to alter, modify, or repeal such charter is therein reserved.⁴ So a statute prohibiting the employment of all persons under the age of eighteen, and of all women, in laboring in any manufacturing establishment more than sixty hours per week violates no contract implied in the granting of a charter to a manufacturing company, nor any right reserved under the constitution to any individual citizen; and may be maintained as a health or police regulation.⁵ A statute providing a different mode for the service of process upon a railway corporation from that prescribed in the charter is held not to impair the obligation of the contract in the charter.⁶ And the same doc-

¹ *Hamilton v. Keith*, 5 Bush (Ky.), 458.

² *Sala v. New Orleans*, 2 Woods (U. S. C. C.), 188.

³ *Covington v. Covington, &c. Bridge Co.*, 10 Bush (Ky.), 69.

⁴ *Com. v. Intoxicating Liquors*, 115 Mass. 153.

⁵ *Com. v. Hamilton Manuf. Co.*, 120 Mass. 383.

⁶ *Railroad Co. v. Hecht*, 95 U. S. 168.

trine has been applied to laws making it liable as a common carrier in spite of special contracts ;¹ limiting the right to sell tickets to agents ;² making it liable for the wages of the employes of a contractor ;³ and for double the value of cattle killed by it in certain cases ;⁴ requiring the bell to be rung or whistle sounded at certain points,⁵ notice of rules to be posted,⁶ or trains to be stopped at stations for a certain time.⁷

It is unnecessary to more fully specify the instances in which the State may bind this class of corporations by legislation, as from what has been said it will be seen that the true test as to whether a statute in a given case can be enforced against them or not, depends upon the circumstance whether it infringes any of the essential rights expressly conferred by their charters, or deprives them of their property without just compensation. If not, the law can be enforced ;⁸ but if it does impair any of the express or contractual provisions of the charter, it is unconstitutional and void.⁹ So also in some of the States the courts have refused to uphold statutes which relate to the public convenience merely, and are not essential for safety, or which impose additional burdens upon these corporations, of mere private interest, which are not essential either to the safety or convenience of the public.¹⁰ But the tendency of the courts is

¹ *Mobile, &c. R. R. Co. v. Franks*, 41 Miss. 494.

² *Foy v. State*, 63 Ind. 552.

³ *Hart v. Boston, &c. R. R. Co.*, 121 Mass. 510 ; *Brown v. Com. & Passumpsit River R. R. Co.*, 31 Vt. 214.

⁴ *Little Rock, &c. R. R. Co. v. Payne*, 33 Ark. 816 ; *Jones v. Galena, &c. R. R. Co.*, 16 Iowa, 6 ; *Cairo, &c. R. R. Co. v. People*, 92 Ill. 97 ; *Tredway v. Sioux City, &c. R. R. Co.*, 43 Iowa, 527.

⁵ *Pittsburgh, &c. R. R. Co. v. Brown*, 67 Ind. 45 ; *Western Union R. R. Co. v. Fulton*, 64 Ill. 271.

⁶ *Chicago, &c. R. R. Co. v. Fuller*, 17 Wall. (U. S.) 860.

⁷ *Davison v. State*, 4 Tex. App. 545.

⁸ *Gillam v. Sioux City, &c. R. R. Co.*, 9 Rep. 375 ; *Nelson v. Vt. & Canada R. R. Co.*, 26 Vt. 717 ; *Suydam v. Moore*, 8 Barb. (N. Y.) 358 ; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441 ; *Jones v. Galena, &c. R. R. Co.*, 16 Iowa, 6 ; *New Albany, &c. R. R. Co. v. Tilton*, 12 Ind. 3 ; *Norris v. Androscoggin R. R. Co.*, 39 Me. 393 ; *Penn. R. R. Co. v. Riblet*, 66 Penn. St.

164 ; *Union R. R. Co. v. Cambridge*, 11 Allen (Mass.) 287 ; *Vazie v. Mayo*, 45 Me. 560 ; *Lake Shore, &c. R. R. Co. v. Cincinnati, &c. R. R. Co.*, 30 Ohio, 604 ; *Toledo, &c. R. R. Co. v. Jacksonville*, 67 Ill. 37 ; *State v. Southern Pacific R. R. Co.*, 24 Tex. 80 ; *Whitson v. Franklin*, 34 Ind. 392 ; *Tuice v. Hannibal, &c. R. R. Co.*, 49 Mo. 438 ; *Ditberner v. Chicago, &c. R. R. Co.*, 47 Wis. 138 ; *Peters v. St. Louis, &c. R. R. Co.*, 23 Mo. 107 ; *Kent v. N. Y. Central R. R. Co.*, 12 N. Y. 628 ; *Pratt v. Atlantic, &c. R. R. Co.*, 46 Me. 65.

⁹ *Phila, &c. R. R. Co. v. Bowers*, 4 Houst. (Del.) 506 ; *Com. v. Penn. Canal Co.*, 66 Penn. St. 41 ; *Illinois Central R. R. Co. v. Bloomington*, 76 Ill. 447 ; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 389 ; *State v. Nuyes*, 47 Me. 189 ; *Com. v. Portland, &c. R. R. Co.*, 63 Me. 269.

¹⁰ *Nelson v. Vt. & Canada R. R. Co.*, ante ; *Tombs v. Rochester, &c. R. R. Co.*, 18 Barb. (N. Y.) 583 ; *Underhill v. N. Y. & Hudson R. R. Co.*, 21 Barb. (N. Y.)

towards a liberal exercise of the police power of the State over these corporations in all matters where it might be exercised over natural persons.¹

Police regulations apply as well to corporations already existing as to those afterwards created, unless the terms of the statute expressly

489; *Erie v. Erie Canal Co.*, 59 Penn. St. 174; *Illinois Central R. Co. v. Bloomington*, 76 Ill. 447.

¹ *Munn v. Illinois*, 94 U. S. 113. The State may provide for the indictment of any company employing a conductor or engineer who has no certificate that he is not afflicted with color-blindness. *Nashville, &c. R. Co. v. State*, 83 Ala. 71; *affirmed*, 128 U. S. 96; 38 Am. & Eng. R. Cas. 1. The statute (of Alabama) further provided that the expense of examinations should be borne by the company seeking to employ such servants. In the case before the Federal supreme court the validity of this clause was not in controversy, but Mr. Justice FIELD, in the course of his opinion, took occasion to say that it was not unconstitutional. But in a subsequent case the Alabama court has held that this part of the statute is unconstitutional, declining to follow the holding of the Federal court on the ground that the remarks of the learned justice were mere *obiter dicta*. *Louisville, &c. R. Co. v. Baldwin*, 85 Ala. 619; 38 Am. & Eng. R. Cas. 5. See also *Baldwin v. Kouns*, 81 Ala. 272; 31 Am. & Eng. R. Cas. 347. The same principles apply to a statute providing for other qualifications of railroad employes. *Smith v. Alabama*, 124 U. S. 465; 33 Am. & Eng. R. Cas. 425; *McDonald v. State*, 81 Ala. 279; 33 Am. & Eng. R. Cas. 420. Other instances of the exercise of the State's power of police regulation might be multiplied. The company may be required to heat its cars by some other method than stoves placed inside the car. *People v. New York, &c. R. Co.*, 55 Hun (N. Y.), 409; 5 N. Y. Supp. 945; *People v. Clark*, 14 N. Y. Supp. 642. To light and heat its depots. *Texas, &c. R. Co. v. Mayes (Tex.)*, 15 S. W. Rep. 43. To erect and maintain depots and passenger-stations at all points where two railroads cross. *State v. Wabash, &c. R. Co.*, 83 Mo. 144; 25 Am. & Eng. R. Cas. 133; *Missouri v. Kansas City, &c. R. Co.*, 32 Fed. Rep. 722. To keep its ticket-office

open for a certain length of time before the departure of trains. *Brady v. State*, 15 Lea (Tenn.), 628. *Compare, Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.), 579; 16 Am. Law Review, 818-827. To provide separate accommodations for the white and negro passengers. *Louisville, &c. R. Co. v. State*, 66 Miss. 662, *affirmed*, 133 U. S. 587; 41 Am. & Eng. R. Cas. 36. See *ante*, § 297. The legislature may require that the company shall keep its right of way free from combustible material. *Diamond v. Northern Pacific R. Co.*, 6 Mont. 580; that it shall keep well lighted so much of its roadway as passes through the streets of a city or town. *Cincinnati, &c. R. Co. v. Sullivan*, 32 Ohio St. 152; that where two railroads cross, a watchman shall be kept, that trains on approaching the crossing shall come to a full stop before passing it, and that other precautions shall be taken (*Lake Shore, &c. R. Co. v. Cincinnati, &c. R. Co.*, 30 Ohio St. 604; *Mobile, &c. R. Co. v. People*, 29 Ill. App. 428). *Compare, State v. Noyes*, 47 Me. 189. But this last case has been since declared to uphold too narrow a doctrine, and has been overruled. *Boston, &c. R. Co. v. County Com'rs*, 79 Me. 386; that it shall annually, in a certain month, fix its rates for the transportation of freight and of passengers, and keep a printed copy of a schedule of such rates posted in each of its depots. *Chicago, &c. R. Co. v. Fuller*, 17 Wall. (U. S.) 560, *affirming* 31 Iowa, 187. A statute of Texas required that the company should stop all of its trains for five minutes at every way station. The validity of such a statute is, however, very questionable; and it is believed it could not be enforced against interstate trains; it might very reasonably be objected to also as being an infringement of the company's charter rights. See *Galveston, &c. R. Co. v. Le Gierse*, 51 Tex. 201; *Davis v. State*, 6 Tex. App. 166; *Davidson v. State*, 4 Tex. App. 545; 30 Am. Rep. 166; *State v. Noyes*, 47 Me. 189.

provide otherwise.¹ In this respect they differ from other statutes which can generally affect only corporations afterwards created.

SEC. 496. Regulation of Charges for Carriage of Freight and Passengers.² — Where the right of amendment or repeal is not reserved, and the charter provides that the rates to be charged for the carriage of freight or the carriage of passengers may be fixed in a certain way, as, by the board of directors, the legislature has no power to provide a different mode for fixing such rates, or even to fix them itself.³ But it seems to be now quite well settled that, where the legislature is not restrained by any contract between the State and the corporation, it may limit and regulate such rates in any manner it sees fit, — whether the rates fixed by it are reasonable or not.⁴ In some of the States it is held, however, that the legislature can only interfere with the rates charged for transportation by these companies where the provisions of the act are reasonable, and that the question as to whether they are reasonable or not is judicial, to be determined by the courts.⁵ It may be said, however, that the tendency of the courts is to support full and unrestricted legislative control in this respect. If, however, the legislature should attempt to compel these companies to carry freight and passengers *free of charge*, the courts would doubtless treat the law as unconstitutional. The right to compensation for transportation is one of the essential rights conferred by the charter, and while the legislature may limit the

¹ *Bulkeley v. N. Y., &c. R. Co.*, 27 Conn. 479; *Indianapolis, &c. R. Co. v. Blackman*, 63 Ill. 117; *Western Un. R. Co. v. Fulton*, 64 Ill. 271; *New Albany, &c. R. Co. v. Tilton*, 12 Ind. 3; *Indianapolis, &c. R. Co. v. Kerchival*, 16 Ind. 84; *Jeffersonville R. Co. v. Gabbert*, 25 Ind. 431; *Rodemacher v. Milwaukee, &c. R. Co.*, 41 Iowa, 297; 20 Am. Rep. 592; *Portland, &c. R. Co. v. Boston, &c. R. Co.*, 65 Me. 122; *Wilder v. Maine Central R. Co.*, 65 Me. 332; 20 Am. Rep. 698; *Sawyer v. Vermont, &c. R. Co.*, 105 Mass. 196; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Cincinnati, &c. R. Co. v. Cole*, 29 Ohio St. 126; *Pittsburgh, &c. R. Co. v. Southwest Penn. R. Co.*, 77 Penn. St. 173. See also *Stearns v. Old Colony R. Co.*, 1 Allen (Mass.), 493; *Baxter v. Boston, &c. R. Co.*, 102 Mass. 383. A statute requiring farm crossings to be constructed is unconstitutional in so far as it affects a company whose right of way was secured prior to

its passage. *Gulf, &c. R. Co. v. Rowland*, 70 Tex. 298; 35 Am. & Eng. R. Cas. 286. Compare, however, *ante*, Chap. XV.

² See *ante*, §§ 202–203.

³ *Hamilton v. Keith*, 5 Bush (Ky.), 458.

⁴ *Munn v. Illinois*, 94 U. S. 113; *Stone v. Wisconsin*, 94 U. S. 181; *Chicago, &c. R. Co. v. Iowa*, 94 U. S. 155; *Chicago, &c. R. Co. v. Arkley*, 94 U. S. 179; *Winona, &c. R. Co. v. Blake*, 94 U. S. 180 (the famous Granger cases); *Union Pacific R. Co. v. United States*, 99 U. S. 700; *Ill. Central R. Co. v. People*, 95 Ill. 313; *Attorney-General v. Railroad Companies*, 35 Wis. 425; *Cincinnati, &c. R. Co. v. Cole*, 29 Ohio St. 126; *Mobile, &c. R. Co. v. Steiner*, 61 Ala. 557; *State v. Winona, &c. R. Co.*, 19 Minn. 434.

⁵ *Sloan v. Pacific R. Co.*, 61 Mo. 64; *Philadelphia, &c. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Chicago, &c. R. Co. v. People*, 67 Ill. 11.

amount to be taken, it cannot compel the company to carry either freight or passengers free.¹ If a railway company is authorized to fix "reasonable" rates for the carriage of freight and passengers, it is for the court and jury to say whether the rates fixed by it are reasonable or not;² and the legislature may, in such a case, fix a maximum rate of charge for transportation over the road.³ If the charter or general law fixes the maximum rates of charge for a definite number of miles, and the company is left to fix reasonable rates for less distances, it is held that the company has no authority to fix rates for such shorter distance which exceed the maximum allowed for the longer distance.⁴ The legislature may, in the absence of any limitation upon its authority in that respect contained in the charter, compel these companies to carry freights and passengers at uniform rates, and without discrimination as to trains; but in the absence of any statute to that effect, they are at liberty to discriminate in rates both as to trains and the distance to be travelled,⁵ and between passengers purchasing tickets and those paying upon the cars; but they cannot discriminate as to persons.⁶ Contracts may be made with shippers, in the absence of any statute prohibiting, to refund by way of rebate or drawbacks a certain portion of the regular tariff rate; but the agreement is not valid if it is also accompanied by the further agreement that such rebates shall not be allowed to others.⁷ But it is within the power of the legislature to prevent the allowance of rebates and drawbacks; and such legislative interference is not of doubtful utility, as under this pretence very unjust discriminations are often made. Where the directors of the company are permitted by law to fix the rates of charge, it is not essential that they should do so by a resolution of the board. It is sufficient if certain established rates are adopted by the company; and the company is bound by such rates, whether established by the directors or other officers or agents of the company.⁸

Where the charter granted by the State to a railway company

¹ Penn. R. Co. v. Sly, 65 Penn. St. 205; Boyle v. Philadelphia, &c. R. Co., 54 Penn. St. 310.

² Campbell v. Marietta, &c. R. Co., 23 Ohio St. 168; Smith v. Pittsburgh, &c. R. Co., 23 Ohio St. 10.

³ Peik v. Chicago, &c. R. Co., 94 U. S. 164.

⁴ Smith v. Pittsburgh, &c. R. Co., 23 Ohio St. 10.

⁵ Penn. R. Co. v. Sly, 65 Penn. St. 205; State v. Overton, 24 N. J. L. 435.

⁶ Indianapolis, &c. R. Co. v. Rinard, 46 Ind. 293.

⁷ Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505.

⁸ Jeffersonville, &c. R. Co. v. Rogers, 28 Ind. 1; Hilliard v. Gould, 34 N. H. 230; Manchester, &c. R. Co. v. Fisk, 33 N. H. 297.

authorized the company to "fix, regulate, and receive tolls and charges for transportation of persons and property," there is an implied condition annexed to the grant that the tolls and charges fixed shall be reasonable. Such a grant does not deprive the legislature of power to secure, through its established commissions, conformity by the company to a standard of reasonableness in its rates.¹

¹ *Stone v. Natchez, &c. R. Co.*, 62 307; 23 Am. & Eng. R. Cas. 577. See 8 Miss. 646; 21 Am. & Eng. R. Cas. 17; Am. & Eng. Ency. Law, pp. 914-917 and *Stone v. Farmers' L. & T. Co.*, 116 U. S. notes.

CHAPTER XXXIII.

FORFEITURE OF CHARTER.

SEC. 497. Can be claimed only by the Government.
 498. Proceedings to forfeit Charter.
 499. Grounds of Forfeiture.
 500. Effect of Forfeiture on the Powers and Franchises.

SEC. 501. Restrictions upon Power of Legislature to forfeit Franchises.
 502. Other Modes of terminating Corporate Existence.

SEC. 497. **Can be claimed only by the Government.** — Unless the statute expressly provides for the forfeiture of a charter at the suit of an individual, only the government can assert the right to have it forfeited; and the mere circumstance that the corporation has done acts which are a good ground for a forfeiture cannot be shown by individuals in collateral proceedings,¹ because the State may waive the forfeiture or enforce it, as it pleases;² and until a forfeiture has been declared, it is not deprived of any of its corporate powers or functions,³ and may enforce by action any claim in its favor,⁴ including subscriptions to its stock;⁵ nor does the fact that a cause of forfeiture exists work a forfeiture or operate as a defence to an action against it;⁶ and this has been held to be so, although there is a provision in the charter or general law providing that if the corporation shall do, or omit to do, a certain act, its charter shall, after a certain number of days, be *ipso facto* forfeited, and the period so limited has elapsed.⁷ A forfeiture can only be declared by a direct

¹ Taggart v. Western Md. R. Co., 24 Md. 563; Hamilton v. Annapolis, &c. R. Co., 1 Md. Ch. 107; Mississippi, &c. R. Co. v. Cross, 20 Ark. 443; Hammett v. Little Rock, &c. R. Co., 20 Ark. 204.

² Frost v. Frostburgh Coal Co., 24 How. (U. S.) 278.

³ Penobscot Boom Co. v. Lamson, 15 Me. 224.

⁴ Hughes v. Bank of Somerset, 5 Litt. (Ky.) 45; Mechanics Building Assoc. v. Stevens, 5 Duer (N. Y.), 676.

⁵ Buffalo, &c. R. Co. v. Cary, 26 N. Y. 75; Conn. & Pass. River R. Co. v.

Bailey, 24 Vt. 465; Waterford, &c. Ry. Co. v. Dalbiac, 6 Exchq. 443.

⁶ Com. v. Worcester T. Co., 3 Pick. (Mass.) 227.

⁷ Atchafalaya Bank v. Dawson, 13 La. 497; People v. Ulster, &c. R. Co., 128 N. Y. 240; Day v. Ogdensburgh R. Co., 107 N. Y. 129. But see Brooklyn Transit Co. v. Brooklyn, 78 N. Y. 524, where it was held that, where the language used shows the legislative intent was to make the continued existence of the corporation dependent upon its compliance with some requirement of the charter, in case of non-

judicial proceeding, and the question whether the company has done or omitted acts which amount to a forfeiture cannot be inquired into collaterally.¹

SEC. 498. **Proceedings to forfeit Charter.** — Unless the statute provides a special remedy for the forfeiture of a charter, there are two modes of judicial proceedings, to secure that result. One is by *scire facias*, which is a proper remedy when there is a legally existing body capable of acting, but which has abused its powers. The other is by *quo warranto*, or proceedings by information in the nature of *quo warranto*, which is the peculiar remedy when there is a corporate body *de facto* only, which has taken upon itself the capacity to act, when through some defect in its organization or otherwise it cannot legally exercise corporate powers; and this is a proper remedy, whether the corporation is *de jure* or *de facto*. In either case the proceedings must be commenced at the instance of the State; and an individual cannot institute such proceedings in his own name² unless authorized to do so by statute;³ and the question

compliance the powers, rights, and franchises granted are forfeited; it is not simply a cause of forfeiture to be enforced in an action by the State. See also *in re Brooklyn, &c. R. Co.*, 72 N. Y. 245; *Houston v. Houston, &c. R. Co.*, 84 Tex. 581, to the same effect.

¹ *Selma, &c. R. Co. v. Tipton*, 5 Ala. 787; *Duke v. Cahawba Nav. Co.*, 16 Ala. 372; *Loring Valley Water Works v. San Francisco*, 22 Cal. 434; *Union Branch R. Co. v. East Tenn., &c. R. Co.*, 14 Ga. 327; *Thompson v. N. Y. & Harlem R. Co.*, 3 Sandf. Ch. (N. Y.) 625; *Brookville, &c. Turnpike Co. v. McCarty*, 8 Ind. 392; *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Day v. Stetson*, 8 Me. 372; *Chesapeake, &c. Canal Co. v. Railroad Co.*, 4 G. & J. (Md.) 1; *Regents of University v. Williams*, 9 id. 365; *Planters' Bank v. Bank of Alexandria*, 10 id. 346; *Hamilton v. Annapolis, &c. R. Co.*, 1 Md. Ch. 107; *Com. v. Union Ins. Co.*, 5 Mass. 230; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. (Mass.) 49; *Bayless v. Orne, Freem. Ch. (Miss.)* 173; *Grand Gulf Bank v. Archer*, 17 Miss. 151; *Bohannon v. Binns*, 31 Miss. 355; *Bank of Missouri v. Merchants' Bank*, 10 Mo. 123; *Bank of Missouri v. Snelling*, 35

Mo. 190; *State v. Carr*, 5 N. H. 367; *Pierce v. Somersworth*, 10 N. H. 369; *State v. Fourth Turnpike Co.*, 15 N. H. 162; *Sewalls Falls Bridge v. Fisk*, 23 N. H. 171; *N. J. Southern R. Co. v. Long Branch Com'rs*, 39 N. J. L. 35; *Buffalo, &c. R. Co. v. Cary*, 26 N. Y. 75; *Matter of N. Y. Elevated R. Co.*, 70 N. Y. 337; *Trustees v. Hills*, 6 Cow. (N. Y.) 23; *Webb v. Moler*, 8 Ohio, 548; *Receivers v. Renick*, 15 Ohio, 322; *Johnson v. Bently*, 16 id. 97; *Kishacoquillas, &c. T. Co. v. McConaby*, 16 S. & R. (Penn.) 140; *Irvine v. Lumbermen's Bank*, 2 W. & S. (Penn.) 190; *State v. Southern Pac. R. Co.*, 24 Tex. 80; *Conn. & Pass. R. Co. v. Bailey*, 24 Vt. 465; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352.

² *Com. v. United States Bank*, 2 Ashm. (Penn.) 249; *National Dock Co. v. Central R. Co.*, 32 N. J. Eq. 755; *People v. Rensselaer, &c. R. Co.*, 15 Wend. (N. Y.) 113; *Kruffett v. Gt. Western R. Co.*, 25 Ill. 353; *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co.*, 4 G. & J. (Md.) 1, 121; *State v. Boston, &c. R. Co.*, 25 Vt. 433; *People v. Northern R. Co.*, 42 N. Y. 217; *People v. Jackson, &c. R. Co.*, 9 Mich. 285.

³ *Com. v. Alleghany Bridge Co.*, 20

of forfeiture is purely one for a court of law,¹ and in the absence of a statute specially conferring such powers, a court of equity cannot declare a forfeiture.² The question whether leave to file an information for the forfeiture of a charter shall be granted or not is one which is addressed to the discretion of the court,³ upon motion of the attorney-general or other legal officer of the government.⁴ When the proceeding is brought to oust parties claiming to be a corporation, it should be brought against the individuals; as, if it is brought against the corporation, the information admits its existence as such.⁵

SEC. 499. Grounds of Forfeiture. — The charter of a corporation may be forfeited either for a misuser, or a nonuser of its franchises; and in determining the question, the same principles of forfeiture on failure to perform conditions which are applied to grants to individuals are to be applied to grants of corporate powers.⁶ The ingredient of a bad or corrupt motive is not necessary, but it is sufficient to uphold a forfeiture, if the performance of a condition is neglected or designedly omitted.⁷ But it is not every failure to perform the duties imposed upon a corporation that will work a forfeiture of its franchises.⁸ There must be some plain abuse of power by which the corporation fails to fulfil the design and purpose of its organization, and the acts of misuser or nonuser must relate to matters which are of the essence of the contract between the State and the corporation, *and they must be wilful and repeated.*⁹ There must be something more than accidental negligence, or excess of power, or mere mistake in the mode of exercising it. A single act of *wilful non-*

Penn. St. 185; *Baker v. Backus*, 32 Ill. 79; *Gaylord v. Fort Wayne, &c. R. R. Co.*, 4 Biss. (U. S. C. C.) 286; *Gilman v. Greenpoint Sugar Co.*, 4 Lans. (N. Y.) 482.

¹ *President, &c. v. Trenton Bridge Co.*, 13 N. J. Eq. 46.

² *State v. Merchants' Ins., &c. Co.*, 8 Humph. (Tenn.) 235; *Attorney-General v. Stevens*, 1 N. J. Eq. 369.

³ *Cole v. Dyer*, 29 Ga. 434; *Fall River Iron Works v. Old Colony, &c. R. R. Co.*, 5 Allen (Mass.), 221.

⁴ *State v. Southern Pacific R. R. Co.*, 24 Tex. 80.

⁵ *Mud Creek Draining Co. v. State*, 43 Ind. 236; *People v. Rensselaer, &c. R. R. Co.*, 15 Wend. (N. Y.) 113.

⁶ *Attorney-General v. Petersburg, &c. R. R. Co.*, 6 Ired. (N. C.) 456; *State v. Royalton, &c. T. Co.*, 11 Vt. 431; *Lombard v. Stearns*, 4 Cush. (Mass.) 60; *People v. Kingston, &c. T. Co.*, 23 Wend. (N. Y.) 193.

⁷ *People v. Kingston, &c. T. Co.*, *ante*.

⁸ *State v. Pawtuxet T. Co.*, 8 R. I. 182; *Harris v. Miss. Valley, &c. R. R. Co.*, 51 Miss. 602.

⁹ *Harris v. Miss. Valley R. R. Co.*, *ante*. In this case the failure of a railroad company to file a survey and map of its route within the period named in the charter, was not a sufficient ground of forfeiture.

feasance may be a ground of forfeiture ; but an isolated instance of nonfeasance, *not* wilfully committed or productive of mischievous consequences, is not sufficient. But where an incorporated turnpike company sold a portion of its road to a municipal corporation, and thereafter neglected to repair that portion of it, it was held to amount to such a wilful act of nonuser as warranted a judicial decree forfeiting its charter.¹ In a New York case, in an action by the people against a corporation for its dissolution, the complaint alleged that the corporation was insolvent thirteen years before ; that it then surrendered its property to its creditors ; that it had ever since remained insolvent and neglected to pay its notes and other evidences of debt, and entirely suspended its ordinary and lawful business ; and that another corporation with the same general object had organized under the authority of the State, and was in actual operation in its place. The answer did not deny these facts, but attempted to excuse the alleged forfeiture. It was held that the facts of insolvency and suspension of business being admitted in the answer, the law admitted no excuse for the forfeiture, nor was any explanation available ; and there being no issue in the case to be determined by evidence, and no trial being necessary beyond an application of the law to the facts, the plaintiffs might apply to the court for judgment on the pleadings ; and that the case was a proper one for a judgment of forfeiture, dissolving the corporation and restraining defendants who were charged with usurping and attempting to exercise its franchise, from further exercising the same, and imposing a fine for its previous unlawful use.² So where a corporation in violation of the statute keeps its principal office out of the State, such violation of the law affords a good ground for the forfeiture of its charter. Thus, in a Wisconsin case,³ the statutes of Wisconsin relating to levy of attachment or execution upon shares of stockholders in corporations, to proceedings by or against corporations, and to the exercise of the visitatorial powers of the State over them, as well as the act regulating the duties of the railway commissioner, and the general act concerning railway corporations, under which the defendant was organized, and other statutes, require, at least by necessary implication, that the principal place of business, the records, and the residence of the principal officers of

¹ State v. Pawtuxet T. Co., 8 R. I. 182.

² State v. Milwaukee, &c. R. R. Co.,

³ People v. Northern R. R. Co., 53 45 Wis. 579.
Barb. (N. Y.) 98.

private corporations created by the State shall be within the State, and the charter of such a corporation may be adjudged forfeited for continued neglect of such duty.

Independently of statutes, it is the duty of a private corporation to keep its principal place of business, its records, and the residence of its officers so located as to render it accessible to the process and to the exercise of the visitorial power of the State by which it is created; and a forfeiture may be adjudged for violation of this common-law obligation.¹ It may be said that the persistent non-performance of the conditions of a charter or of the duties imposed by statutes applicable thereto, is *per se* a ground of forfeiture.² So the constant and wilful violation of fundamental conditions of the charter entitles the State to demand its forfeiture. A corporation, by the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for wilful misuser or nonuser. It is the tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated. It is a general principle that *where there has been a misuser, or a nonuser, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture.*³ So the wilful acts and neglects of its officers are regarded as the defaults of the corporation, and render it liable to a dissolution.⁴ But an officer of a corporation cannot cause a forfeiture of the charter by a direct and palpable violation of the authority or instructions given him by the directors. If they give

¹ An information showing that the principal office of the company is in New York; that its books and records have always been kept in that city; that none of its principal officers reside in Wisconsin; and that, by reason of these facts, it has been impossible to enforce an attachment against the shares of stockholders in actions brought in courts of Wisconsin in accordance with the State laws, — was held on demurrer to show sufficient ground for a forfeiture of the company's charter. *State v. Milwaukee, &c. R. Co.*, 45 Wis. 479. See *Darnell v. State*, 48 Ark. 321.

² *People v. Kingston, &c. T. Co.*, 23 Wend. (N. Y.) 193.

³ *Com. v. Commercial Bank*, 28 Penn. St. 383; *State v. New Orleans Gas-Light, &c. Co.*, 2 Rob. (La.) 529. A statute pro-

vided that at the expiration of four years from the grant of the charter such charter should be forfeited unless the company organized and commenced business within that time. Held that the limitation did not run where the legislature, within that time amended the charter, such an amendment constituted a waiver by the legislature of the right to claim a forfeiture. *Farnsworth v. Lime Rock R. Co.*, 83 Me. 440; 22 Atl. Rep. 373. See also *People v. Atlantic Ave. R. Co.*, 57 Hun (N. Y.), 378. As to the legislative power to remit a forfeiture, see *People v. Los Angeles El. R. Co.*, 91 Cal. 338; 27 Pac. Rep. 673.

⁴ *Bank Com'rs v. Bank of Buffalo*, 6 Paige (N. Y.), 497; *Life & F. Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. (N. Y.) 31.

him no instructions against doing the illegal act, and he commits it in the course of his ordinary duties, it is their act doubtless; but if his act is in direct violation of express instructions from them, as well as of the charter, the corporation is not bound by his act, and the charter is not forfeited thereby. Neither does a departure from the directions given in the charter to the agents of the State, in the proceedings to organize the corporation, nor the neglect of the directors to sell the stock of a subscriber who has not paid the calls, as they are directed to do by the charter, afford a ground of forfeiture.¹ The mere omission of a corporation to exercise its powers does not, of itself, unconnected with other acts, in all cases work a forfeiture of its charter.²

But the charters of business corporations imply and require that they shall perform the business for which they were instituted; and a substantial suspension of business after its commencement, like an entire omission to commence business, is a violation of the charter, and gives the court power to appoint a receiver, and grant an injunction.³ A railway company which has completed its road between the *termini* named in the charter, or articles of association, forfeits its franchises by abandoning or ceasing to operate a part of its road.⁴ But a railroad company which has built a branch road under authority from the legislature, maintains it in good condition for use, uses it regularly and sufficiently for the transportation of freight, and is ready at all times to transport passengers and draw passenger-cars over it whenever any shall be offered to be transported or drawn, for a reasonable toll or compensation, does not forfeit its franchise by discontinuing, after public notice, the running of regular passenger trains over the branch railroad, when there is not sufficient passenger business at any rate of toll or fare to pay the expense of running them, by reason of the establishment, under authority of the legislature, of a competing line for the transportation of passengers over a horse-railroad.⁵ A reasonable and substantial performance of the conditions is all that is necessary to defeat a claim to a forfeiture.⁶

¹ *State v. Commercial Bank of Manchester*, 14 Miss. 218, 237.

² *Attorney-General v. Bank of Niagara, Hopk.* (N. Y.) 354; *Regents of University of Maryland v. Williams*, 9 G. & J. (Md.) 365.

³ *Ward v. Sea Ins. Co.*, 7 Paige

(N. Y.), 294; *Matter of Jackson Marine Ins. Co.*, 4 Sandf. Ch. (N. Y.) 559.

⁴ *People v. Albany, &c. R. R. Co.*, 24 N. Y. 261.

⁵ *Com. v. Fitchburg R. R. Co.*, 12 Gray (Mass.), 180.

⁶ *Thompson v. People*, 23 Wend.

When a cause of forfeiture has been established, the court cannot refuse to give a judgment of forfeiture simply because the forfeiture would injuriously affect public interests.¹ When a cause of forfeiture has once arisen, whether from nonfeasance, or otherwise, it cannot be legally atoned for by subsequent good behavior. Thus, putting a turnpike into good repair prior to the filing of an information to declare a forfeiture for want of repair, is no bar to the writ. Where a nonfeasance, as bad repair of a road, is made a cause of forfeiture by statute, if the default was occasioned by any irresistible cause, it lies with the defendants to show that fact.² The grounds of forfeiture of a charter may be waived by the legislature.³ Corporations are mere creatures of the law, and cannot violate the conditions upon which they are incorporated. But the law does not design that, for every imaginable breach, the charter of a corporation must be revoked. And it rests with the sovereign power, as a reserved right, to determine not only when proceedings of forfeiture shall be instituted, but also when violations of a charter are to be overlooked.⁴ An act of the legislature passed with notice of the grounds of forfeiture, which recognizes the corporation as still existing notwithstanding them, operates as a waiver of the forfeiture.⁵

SEC. 500. Effect of Forfeiture on the Powers and Franchises. —

After the charter of a corporation is declared forfeited, it can do no act by which rights can be acquired, nor can it maintain a suit to enforce those acquired during the continuance of the charter, unless its power and capacity for that purpose is continued by statute after its existence as a corporation is ended.⁶ Although a corporation is dissolved by a legal seizure or forfeiture of its franchises, those franchises are not thereby destroyed; they exist in the cus-

(N. Y.) 537; *People v. Kingston, &c. T. ick Female Seminary v. State*, 9 Gill Co., 23 Wend. (N. Y.) 193. And see (Md.), 379.
Commonwealth v. Alleghany Bridge Co., 20 Penn. St. 185.

¹ *State v. Penn., &c. Canal Co.*, 23 Ohio St. 121.

² *People v. Hillsdale & Chatham Turnpike Co.*, 23 Wend. (N. Y.) 254; *Com. v. Turnpike Co.*, 5 Cush. (Mass.) 509.

³ *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Chesapeake, &c. Canal Co. v. Ohio Railroad Co.*, 4 G. & J. (Md.) 1, 127; *State v. New Orleans Gas-light & Banking Co.*, 2 Rob. (La.) 529.

⁴ Board of Commissioners for Freder-

⁵ *Kishacoquillas, &c. Turnp. Co. v. McConahy*, 16 S. & R. (Penn.) 140; *McConahy v. Turnp. Co.*, 1 Penn. 426; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *State v. Bank of Charleston*, 2 McMull. (S. C.) 439; *State v. Mississippi, &c. R. R. Co.*, 20 Ark. 495; *People v. Fishkill, &c. Plank Road Co.*, 27 Barb. (N. Y.) 445; *Lumpkin v. Jones*, 1 Kelly (Ga.), 27; *Com. v. Union Fire, &c. Ins. Co.*, 5 Mass. 230.

⁶ *Saltmarsh v. Planters & Merchants' Bank of Mobile*, 17 Ala. 761.

tody of the State, and may be afterwards granted to the same or to other individuals.¹

SEC. 501. Restrictions upon Power of Legislature to forfeit Franchises. — Where the charter of a corporation, which the legislature has not reserved power to repeal, makes certain defaults only qualified cause of forfeiture, giving the corporation an opportunity to relieve itself from the forfeiture, a subsequent act, imposing an absolute forfeiture in case of such defaults, is void as to such corporation, because it would impair the obligation of the contract contained in the charter. The remedy is here a part of the contract.² Where the legislature is restricted by the constitution from the exercise of judicial power, it is not competent, without the consent of a corporation, to declare their franchise forfeited and the corporation abolished, and their property transferred to another corporation, without due process of law.³ Under a general statute, reserving to the legislature the right to amend or repeal all charters thereafter to be granted, with a proviso that they will not repeal a certain class of charters unless for some violation or other default, the legislative inquiry to ascertain if there has been a violation or other default is not "a judicial act" within the meaning of the clause of a bill of rights which forbids the legislature from exercising judicial acts.⁴ But a declaration of the forfeiture of a charter, in pursuance of a law accepted by the corporation, does not violate the constitution by impairing the obligation of contracts. The effect of a repeal and of a forfeiture is the same, so far as the rights of creditors are concerned. And a charter may be made liable to repeal by the legislature, by an amendment accepted by the corporation, reserving the power, notwithstanding the charter was before irrevocable. Persons must be regarded as having contracted with a corporation upon the hypothesis of the existence and possible exercise of the power to consent to the forfeiture of the charter upon certain defaults; but such consent, *it seems*, can only be given by all the stockholders.⁵

SEC. 502. Other Modes of terminating Corporate Existence. — The existence of a corporation may be terminated by a surrender of its

¹ *State Bank v. State*, 1 Blackf. (Ind.) 267. Williams, 9 G. & J. (Md.) 365; *Bruffett v. Great Western R. R. Co.*, 25 Ill.

² *Com. v. U. S. Bank*, 2 Ashm. (Penn.) 353.

³ *Aurora v. Laughery T. Co. v. Holt-house*, 7 Ind. 59; *Powell v. Sammons*, 31 Ala. 552. ⁴ *Crease v. Babcock*, 23 Pick. (Mass.) 334.

⁵ *Mobile & Ohio R. R. Co. v. State*, 29 Ala. N. S. 573.

⁸ *Regents of University of Md. v.*

franchises to, and their acceptance by the State,¹ or by repeal of the charter where the rights of repeal is reserved. But if a corporation is established under a general law, the repeal of the law does not affect the right of corporations, formed under it before its repeal.² But a special charter may be repealed by a general law.³ A corporation is not dissolved by insolvency,⁴ the appointment of a receiver,⁵ or by a lease of the corporate property.⁶ But when it is consolidated with another under authority of law, or when under such authority it transfers its franchises, it is dissolved;⁷ though the question as to whether the old corporations become extinct or not, is one of legislative intent, to be gathered from the acts authorizing the consolidation.⁸

¹ *Lanman v. Lebanon Valley R. Co.*, 30 Penn. St. 42. *U. S. Electric Light Co. v. Leiter*, 19 D. C. 575.

² *Bewick v. Alpena Harbor Co.*, 39 Mich. 700; *Danworth v. Coolbaugh*, 5 Iowa, 300.

⁵ *Kincaid v. Dwinell*, 59 N. Y. 548.

⁶ *Com. v. Central, &c. R. Co.*, 52 Penn. St. 506.

³ *State v. Com'rs of Taxation*, 37 N. J. L. 228.

⁷ *Bishop v. Brainerd*, 28 Conn. 289; *Shields v. Ohio*, 94 U. S. 319.

⁴ *People v. Northern R. Co.*, 42 N. Y. 217. Neither insolvency nor a failure to elect trustees will effect, of itself, a dissolution of the corporation.

⁸ *Central, &c. R. Co.*, 90 U. S. 665; *Atlantic, &c. R. Co. v. Georgia*, 98 U. S. 359; *Maine Central R. Co. v. Maine*, 96 U. S. 499.

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